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THE HISTORY OF

ANCIENT RICHMOND AND DUNDEE

PARLIAMENT

SCOTLAND

IN THE

A SHORT INTRODUCTION TO THE GOVERNMENT OF SCOTLAND

BY

JOHN CAMPBELL, ESQ. OF DUNDEE, ADVOCATE-GENERAL
OF SCOTLAND, AND ONE OF THE JUDGES OF THE
HIGHEST COURT OF APPEAL IN THAT KINGDOM
IN THE YEAR 1794

PRINTED FOR JAMES WILKIE, IN THE
MARKET PLACE, DUNDEE, AND FOR
JAMES WILKIE, IN THE MARKET PLACE,
GLASGOW, 1794

AN
Historical Account
OF THE
ANCIENT RIGHTS AND POWER
OF THE
PARLIAMENT
OF
SCOTLAND.

TO WHICH IS PREFIXED,
A SHORT INTRODUCTION UPON GOVERNMENT IN GENERAL,
BY
ANDREW FLETCHER, OF SALTOUN.

Non censes igitur rerum omnium Arbitrium penes Regem esse debere?
Minime; nam eum non solum Regem sed etiam Hominem esse memini, multa
per ignorantium errantem multa sponte peccantem, multa prope invitum,
quippe Animal ad omnem favoris et odii auram facile mutabile.

Buch. de Jure Regni apud Scotos.

ABERDEEN:
PRINTED FOR JAMES JOHNSTON, EXCHANGE COURT, UNION
STREET; AND SOLD BY STIRLING AND SLADE, EDIN-
BURGH; AND LONGMAN, HURST, REES, ORME,
AND BROWN, PATERNOSTER-ROW,
LONDON.

1823.



SCOTLAND.
PARLIAMENT.
ANCIENT RIGHTS AND POWER
OF THE
MAGNANIMOUS

TO WHICH IS PREFIXED,
A SHORT INTRODUCTION UPON GOVERNMENT IN GENERAL,
AND UPON THE CONSTITUTION OF SCOTLAND;
BY ANDREW FLETCHER, OF BALFOUR,
ESQ.; A BARRISTER AT LAW,
IN SCOTLAND.
LONDON, Printed by J. KNEELAND, at the
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1704.

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Preface,

BY THE

EDITOR OF THE PRESENT EDITION.

THIS short Treatise on the ancient Constitution of the Parliament of Scotland appeared in 1703, when the proposed Union between England and Scotland had become the subject of discussion; and, although it was printed anonymously at Edinburgh, the proofs are complete that it was written by the celebrated patriot, ANDREW FLETCHER, of Saltoun. At that period, the system of bribery had arrived at considerable maturity; and it was the object of FLETCHER, to rouse the members of parliament to a sense of their duty, before their meeting. That his attempt must have been highly obnoxious to Government, will easily be believed: he was branded with the epithets of a meddling agitator, entertaining views hostile to the State; a vain demagogue, and a *violent man*, who would not listen to reason. In the meantime, the Treatise was, as far as possible, bought up and destroyed; and, so scarce had it become, that, when in 1792, the Earl of Buchan published the life of FLETCHER, although he had heard of this Essay,

he had never seen a copy, and believed them all destroyed. A few, however, have been preserved, in private libraries; and, upon the blank leaf of the copy in the library at Slains Castle, there is written in the hand-writing of Mr. A. Hay of Delgaty, husband of the Countess Mary of Erroll, probably about the year 1740—*Proposals by Mr. Fletcher of Saltoun, in Parliament, 1703—strange!* Then follow, in the same hand, the twelve Regulations concerning the constitution of parliament and limitation of the monarchy, which the reader will find in the appendix; which, however strange they may have appeared to Mr Hay, fourscore years since, are now generally recognised as just in principle; and the Government of Spain appears to be very nearly adjusted to the model of FLETCHER.

The great object of our Scottish patriot was to secure a fair Representation of the People in Parliament, and so to limit the powers of the Sovereign, that Parliament should at all times possess an efficient controul over his public acts. But while he thus laboured to establish the independence of parliament, it certainly appears from his writings, that he considered the peasantry as unworthy of political freedom, and proposed to reduce them to a state of vassalage little short of absolute slavery. We are, however, to bear in mind, that political information was not generally diffused among the lower orders in Scotland, until the last century was drawing towards its close. In FLETCHER'S time, the tenantry, tradesmen, and mechanics, were, for the most part, ignorant of the

principles of free government ; but were he now living, although he would find but few freeholders, such as those who contended with him for the honour and independence of their country, he would find multiplied and convincing proofs of the fact, that the lower orders are now to be called so only in respect of wealth ;—their information, both political and religious, fully entitling them to a participation in all the advantages of a Free Constitution. The corruption, that as FLETCHER anticipated, degraded for a long time the character of the great majority of the nobility and gentry of Scotland, has been counteracted by the better education of the lower classes, and a diffusion of political information, which promises to bring about changes creditable to the national character, and highly advantageous to the country.

Upon the whole, the Editor trusts that this Treatise, the work of our highly respected countryman, shall be favourably received by the public, after having remained for more than a century in obscurity. The party animosities that occasioned its suppression have now passed away ; but the truths it contains are immutable, and in many instances applicable to the times in which we live.

ABERDEEN, 6th January, 1823.

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in raising and appropriating the Public Money, and
calling for the Accounts, 76.—III. The Power of the
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TO THE RIGHT HONOURABLE

THE

ESTATES OF SCOTLAND,

IN PARLIAMENT ASSEMBLED.

THE subject and design of the following Treatise seems naturally to entitle it to the protection of your august assembly. It is very well known what endeavours have been used for above 100 years past, to lessen the authority of the Estates of Scotland. Courts, benches, pulpits, and even some of those who composed our Parliaments, have been engaged in the conspiracy. There is not one reign since the union of the crowns, but what affords instances of this attempt by some ill men : Nor is it ever like to be otherwise, till you be pleased to re-assume so much of your ancient power, as may make it capital for any man or party to offer it. The last age, or 17th century, was by some called *the age of Kings*, the meaning of which was, in plain *Scots*, an age of tyrants ; France, Denmark, Sweden, Bohemia, Hungary, Naples, and other nations, are speaking instances of it. The power of the estates of those countries was wholly suppressed by their Princes ; and had it not been for the

late happy revolution, this ancient kingdom must in all probability have run the same fate. We were very near it when King James VII. took upon him by despotical proclamations to casse and annul our statutes; and we must always look upon ourselves to be upon the brink of it, when any of our Princes take upon them to dispense with our Laws. But blessed be God, our claim of right in 1689 broke many of the strongest links of that heavy chain which arbitrary Princes and fawning courtiers had put about our necks. It is in your power, my Lords, (for with this title you are all dignified in our old statute books) fully to restore us to our ancient liberty when you come to the next act of settlement; and what that liberty was will plainly appear in the following Treatise. My vouchers are the printed acts of your own illustrious court, and not only those which our late Princes thought fit should appear to the view of the public, but those upon which they had passed an *index expurgatorius*. It has been the misfortune of our country to have our records twice destroyed by an English usurpation, with a design to deprive us of all the glorious monuments of our ancient liberty, that we might the more easily be subjected as a province to their kingdom. But we did not suffer so much that way by Edward I. and Oliver Cromwell, though in open war against us, as we have suffered from some of our own Princes, who, by the union of the crowns, became English sovereigns. What the two former attempted was by fair hostility, and done by the hand of an avowed enemy; but the latter carried

on the design under the title of fathers of their country, and made some of those who were members of the Estates of Scotland the unnatural destroyers of their own liberty, as is evident by the acts of King Charles II.'s first parliament.

The reason of this, my Lords, was plain. By the records of parliament it appeared, that your Lordships, before the union of the crowns, had a commanding share in all the rights of sovereignty. It was by you, under God, that our Kings did reign; and never did our Princes decree justice, either without or against your authority. It is an incontrovertible maxim in politics, that *dominion ought to follow the property*; and the Estates of Scotland, which were all included under the general name of Lords of manors or freeholders, being the hereditary proprietors of the country before ever we had any thing like a King, it followed by necessary consequence, that your ancestors were our hereditary sovereigns and legislators, and that our Kings had their power and authority from them, as an office of trust, but not of property.—The contrary doctrine has been maintained for some reigns, in order to make our estates of parliament mere vassals to our Princes; but with how little truth, will appear by the following Treatise: The sole end of it is to set your ancient power and authority, my Lords, in a true light, against the advocates and champions of arbitrary power; and that you may re-assume all or part of it, as in your great wisdom shall be found necessary for preserving the honour and liberty of our dear country.

By the abstract of our laws here exhibited, it will appear that our ancestors were men of counsel as well as courage; that they understood government as well as arms; and that so mean a thought could never have entered their souls, as to surrender their right of governing themselves to another nation, either by an imprudent union of the crowns, or by such an union of the kingdoms, as would subject our bodies and souls to the votes of a foreign majority. It is hard if Scotsmen be so much degenerate, that they neither know how to improve their estates, or save their souls, without a foreign direction. An inviolable friendship and good correspondence with England is absolutely necessary; but if this cannot be attained by an union of association, without extending it any further, it is our own fault. The sentence of our laws against them that offer to diminish the power and authority of our estates of parliament, is well enough known: If the force of those laws be enervated, or in any wise remitted or dispensed with, it is easy to foresee the consequence. England is a wise, gallant, and brave nation; they love liberty themselves, and therefore will always have a due regard to the same spirit among others; but must needs despise a people who would tamely part with their freedom as abject slaves, and think them neither fit to be treated as good neighbours, or useful subjects. The reason is plain, because they would constantly endanger the English liberty by falling in with arbitrary Princes.

It is evident, my Lords, that the present danger

of our country arises from the humours of an arbitrary faction, from the expectation that some men have of places and pensions, and from the abettors of different titles to our succession. It is not unknown to your Lordships, that there is a party who look upon her Majesty only as a guardian to her supposed brother; that there is another who absolutely deny her title; and that both those parties are one at bottom: the madness of that party, and the manifest insults they commit upon our Constitution, in Church and State, by invading churches, and praying openly and avowedly for the King and Royal Family, &c. may perhaps prevail upon the weakness of another to throw themselves into the arms of the house of Hanover, without limitations; which must necessarily entail all those grievances upon us, that have taken their rise from that imperfect union of the crowns, which hath proved impolitic and ruinous to our country. May God direct your Lordships to proper means for obviating those dangers. The following Treatise will shew what our ancestors would have done in the like case. In those days, it must certainly have been capital for any man or party to set up a title to the crown, which the estates had disowned, to have denied or distinguished upon the authority of those whom the estates had invested, or to assert a future title in any person or family which the estates had not declared. We are already provided with very good laws against a popish successor: The excellent measures taken by the parliament of England, have secured that nation against the pre-

tensions of any such person, any otherwise than by a successful invasion and rebellion, of which, blessed be God, there is little fear in that kingdom. We may depend upon the assistance of our neighbours the English and Dutch, against any party who set up in our country for the pretended King James VIII.; though if our own people be at liberty, there will be no need of foreign auxiliaries, except the pretender come in with a foreign power, which England and Holland are able, and concerned in interest, to prevent. The case being thus, there is no reason for a precipitant settlement of our succession without limitations: And since these are necessary, it is humbly conceived that the ancient privileges of our parliament and people, briefly discoursed of in the following Treatise, are as proper to be taken into consideration for limitations, as any other. These were the maxims of government by which our ancestors preserved their liberty, and left their posterity free. Our parliaments, by keeping so much of the power of the sword, of the power of the purse, and of the power of disposing all public places of trust, in their own hands, made the reins of our government steady, and not changeable with the tempers of courts, or humours of favorites. Whether this be not more necessary now, since our Princes are removed to another country, than it was whilst they dwelt among ourselves, is humbly submitted to your consideration.

Preface.

THE subject of the following sheets has been much talked of, though but little understood, and unfairly handled by many of those who have meddled with controversies of State, and such parts of our history as related to them. By such men as these has our nation been defamed, both at home and abroad; by them has our true constitution been denied, and a false one imposed upon us; nor have they made any scruple to traduce our Estates of Parliament, and to stigmatize our whole nation with a brand of sedition and rebellion.—Most of the English authors, who have meddled with our affairs in a historical way, except a very few, have followed the same strain; and we have always, since the Union of the Crowns, had an arbitrary party at home, who have been too ready to join with foreign enemies in running down our constitution, and fastening those unjust calumnies upon the whole nation, whilst they pretended to serve the Court, or the interests of their own faction. We might give many instances of this, but Bishop Guthry's Memoirs is a late as well as a pregnant one, and seems to have been published, on purpose to countenance those unjust reflections which are cast upon our country and greatest families by the late Earl of Clarendon.

My motives for entering upon the following work, were as follow :—1. A desire to obviate, as much as possible, such misrepresentations as those above-mentioned, in time to come. 2. To vindicate the memory of our noble ancestors, who waded through Seas of Blood, and gloriously ventured their Lives and Estates in Defence of their Liberty, against Domestic Tyrants and Foreign Invaders. 3. To set our ancient constitution in a true light, which was very much wanted.

In order to this, I resolved to follow our ancient and modern acts of Parliament as my guide, and to join with them such of our historians as I had by me. I chiefly made use of the first printed edition of our acts, called the *Black Acts*, because, printed in a black letter, which were collected and published by authority of Q. Mary, as appears by her commission prefixed to that edition. Yet, it is very well known that it was stifled, not to say suppressed, in the reign of K. James VI. ; and another edition was published then by Sir John Skeen, and republished since, with additions, by Sir Thomas Murray, in the time of K. Charles II. wherein there was care taken to leave out most of those acts which were monuments of the power of our Parliaments in the *Jura Majestatis*. By this means, that first edition came to be almost forgot, and scarcely to be had. This, together with the severity of the late reigns against all attempts for recovering our liberty, and the doctrine of prerogative from our benches and pulpits, which made every thing of that nature sedition and rebellion,

had almost buried the memory of our ancient constitution in perpetual oblivion.

But having obtained one of those Black Acts from a gentleman of great worth and integrity, I compared them carefully with the edition published by Sir Thomas Murray. I did likewise peruse the repealed acts of K. Charles I. in 1641, and the public papers of that time; and consulting as I went along our old Law-Books of Regiam Majestatem, and the ancient acts of K. Malcolm, &c. commonly bound up with them; and taking such helps as Sir Thos. Craig's book de Feudis, and our Historians could afford me, I took care to dispose what related to the power of the three Estates, under their proper heads, as common repositories, that so at one view the reader may have the substance of all that I could find relating to the respective branches of our ancient constitution.

Having accounted thus for my materials and method, I must submit my performance to the censure of the public; but at the same time am very sensible of the importance and danger of such an undertaking. A very learned gentleman of our own country, a great patron of liberty, and happy in a polite pen, has well expressed it,* "That if
"any man in compassion to the miseries of a people, should endeavour to disabuse them in any
"thing relating to Government, he will certainly
"incur the displeasure, and perhaps be pursued by
"the rage of those, who think they find their ac-

* Discourse of Government, with relation to Militias, p. 5.

“count in the oppression of the world, but will
“hardly succeed in his endeavours to undeceive the
“multitude.”

Let the consequence be what it will, I am easy in my own mind; it is the liberty of my country I have in view; I propose no alteration during her Majesty's reign, which I wish may be long and happy. I have quoted my authorities for what I say, I show my countrymen what their ancestors were, and what they designed their posterity should be. I know that I run counter to men of great names and titles, that I thwart a strong party who have been in possession for some reigns, to impose the contrary doctrines as Law and Gospel upon the nation; but, if they will advance falsehoods in matters of fact, they cannot oblige any man to be silent that is able to discover it. The great judge and lawgiver of the world pronounced a curse upon those who removed ancient landmarks, and if he passed such a heavy sentence upon them who would by that means invade a private man's property, what must be the fate of such, as not only remove, but likewise destroy the boundaries of a nation's liberty? It is her Majesty's glory that she comes to the throne upon a foundation directly opposite to men of such principles; and it is the duty of all good Scotsmen to pray that God would preserve her Majesty and their country from the influence and effects of their pernicious counsels. I shall say no more by way of preface, but because the party have recourse to divinity, when they are baffled by law and history, I have subjoined the following Introduction.

AN INTRODUCTION

UPON THE

Nature of Government in General,

AS IT APPEARS BY DIVINE REVELATION.

THE necessity of Government is so obvious, that all societies fall naturally into it; and the wisdom of nations or lesser communities never discovers itself more than when they agree upon such forms of it as are most adapted to the good of the public.

There is nothing so contrary to reason or the good of mankind, as such models of Government, *which oblige the subjects to be on a constant guard against them, or otherwise put them in perpetual danger of their lives, and render their liberties precarious.* Such pernicious models are these, which lodge an absolute and uncontrollable power in *one, few, or many*: I mean such a power as makes those intrusted with the Government noways accountable to the people who intrust them, how inconsistent soever their administration may be with the public welfare.

But of all the models that ever were thought on, that of subjecting mankind to the absolute will of a single person, by hereditary lineal descent, which way soever the first of the line came by the title, offers the greatest indignity to human na-

ture, and puts man in a worse condition than the savage brutes. Those creatures, by natural instinct, repel force by force, and are under no subjection but the original law of their being; whereas the model we speak of puts millions of men under a slavish hereditary subjection to the will of a single person, who has no right to that superiority over them by nature, nor perhaps any transcendent virtues that could entitle him to it by choice, if the authors of this system would allow us the liberty of an election.

The first King that we hear of was indeed one of their sort; and to the reproach of all those who maintain such principles, it happened to be Nimrod the 6th grandson of cursed Cham, who usurped such an authority over a part of mankind, though he had five elder brothers, his father, grandfather, and great grandfather, alive at the time: Evidence sufficient that he had no regard to primogeniture, as giving the only title to Government, and a strong presumption that that notion had not then got footing in the world, otherwise his progenitors and elder brothers would certainly have made war upon him for invading their property.

The first King mentioned with the approbation of the divine legislator was one of another character; he comes to the Crown by the people's consent, with strict limitations,* such, indeed, as bespeak the infinite goodness of God towards men: He would have them to be governed according to

* Deut. xvii. from the 15th v. to the end of the chapter.

the dignity of the rational nature, and not to be treated as brutes ; therefore, he strictly forbids their King to multiply horses, and much more to overawe and oppress them by numerous guards and standing armies. He will not allow him to multiply wives to himself, and much less to prostitute the wives and daughters of his subjects.— The reason assigned is observable, lest they should turn away his heart, i. e. from the fear of God, and the care of his subjects, as happened to Solomon, and to some of our Princes that might easily be named. He is not allowed to multiply silver and gold, and much less a prerogative to tax his subjects at pleasure. His heart must not be lifted up above his brethren, and much less must he treat them as abject vassals. He must govern them by law, and for that end must constantly read the statutes, so that his administration must have nothing in it that looks like absolute power and uncontrollable authority, or a demand of obedience without reserve. This law was not proposed to him as a mere scarecrow, without a sanction, but has a dreadful penalty annexed, which implies no less than the loss of his life, and the forfeiture of his crown for himself and his posterity. This was accordingly fulfilled in the person and offspring of Saul, who broke in upon their constitution, as Samuel foretold them he would. †

Thus God cut off that tyrant by the hand of his enemies in battle, and made use of the people to

† 1 Sam. viii. 11, &c.

dethrone his posterity. His next successor, David, though he was appointed by God himself to sit on the throne, was so far from urging that divine right of succession to deprive the people of their just suffrage, that he did not meddle with the administration, till made king by the tribes, and entered into a league, or confirmed the original contract with them; we have reason to think, that, by this league, they obliged him to observe the law of the kingdom enjoined in Deuteronomy, as above-mentioned, for that was their claim of right appointed by God himself.

This hypothesis seems to be very much strengthened by the practice of the ten tribes, when they came to make his grandson, Rehoboam, King.—They demanded an ease from the burdens with which his father had oppressed them, when he broke in upon the original constitution, by multiplying horses, wives, concubines, horsemen, chariots, &c. and oppressing the people to maintain them, as we read at large in his story.* But this young ambitious Prince being resolved to advance his prerogative, refused to comply with their terms; upon which they renounced his authority, and made Jeroboam their King. From this it is evident, that under the Old Testament dispensation, they who were God's peculiar people, and perfectly instructed in his will, understood nothing of the modern doctrine, of the divine right of a lineal succession, that Kings are accountable to none but God, and

* 1 Kings, chapters iv. and xi.

that subjects are to make use of no other defences against their usurpations but prayers and tears.

Under the New Testament dispensation, the infinitely wise and good Author of government took the same care of the liberties of mankind, and confined the power of governors within the same limits. This will be evident to those that compare Solomon's notion of government before his defection, with St. Paul's definition of rulers, in his epistle to the Romans. The former prayed to God *for an understanding heart, to judge the people, and to discern between good and bad.** The latter informs us, *that rulers are not a terror to good works, but to the evil; that they are the ministers of God to the people for good, attend continually upon this very thing, and that this entitles them to obedience, prayers, and revenue, from the subject.†* So that it appears undeniably clear from revelation, that the good of the people, and not the grandeur of rulers, is the end for which God appointed government.

If we look into profane history, we shall find that the Grecians, Romans, and other civilized nations, did form to themselves the same idea of government by the light of reason, a beam which comes from the same Father of Light, though nothing so clear as that of revelation. It were easy to prove this by multitudes of instances, but it does not suit with my designed expedition and brevity; therefore I come now to the ancient and true con-

* 1 Kings, chap. iii. 9.

† Rom. xiii. 3, 4, 5, 6, 1 Tim. ii. 2.

stitution of the government of Scotland, by which it will appear that our ancestors have been men of great wisdom and virtue, that they modelled their government according to Scripture and reason, and that the standing of our kingdom for above two thousand years, is as much owing to the prudence and consummate wisdom of our Estates, when met in Parliament, as to their valour and intrepidity when they appeared in the field ; for those very persons who composed our parliaments, viz. the greater and lesser barons, our freeholders and commissioners of burghs, were anciently our leaders in war.

AN HISTORICAL ACCOUNT
OF THE
ANCIENT RIGHTS AND POWER
OF THE
Parliament of Scotland,
&c. &c.

IT will be evident to any man, who peruses our acts of parliament and histories, that the declaration of the estates, or claim of right, agreed on in April, 1689, and afterwards tendered to King William and Queen Mary, though noble in itself, the then posture of affairs being considered, came very much short of recovering our ancient liberty and constitution.

It was as evident by the whole course of that reign, though one of the best we ever had, that Scotland suffered extremely, both in its freedom, wealth, and reputation, because we were not beforehand restored to the full possession of our ancient liberties.

And it is very well known how much we have been blamed since by ourselves, and by others, for not having made better terms with that Prince,

and our neighbours, before we entailed our crown in the same manner as they did theirs.

We have now another opportunity put into our hands, of obtaining what was then omitted—our experience since that time is enough to convince us that it is necessary : and our improvement of this will bespeak us a wise nation, or the contrary, in the eyes of Europe, and all succeeding posterity ; for according to our behaviour at this juncture, we shall either lay the foundation of future liberty, or condemn ourselves to a perpetual and unpitied slavery.

It is natural for men to have a veneration for their ancestors ; and it is our happiness to have had such, as the Romans, in the height of their glory and freedom, would have accounted it their honor to be descended from. For this reason, it is thought proper to give a brief account of our ancient constitution, from our statutes and histories : This may be of use to direct us in the future settlement of our succession, and will be attended with a double advantage. First, it will secure us from the imputation of making new demands ; and next, it ought to satisfy our Princes that they abate nothing of their just prerogative, when they receive our crown with such limitations.

It is therefore humbly proposed,

That the parliament of Scotland should take into consideration their ancient privileges, in order to re-assume such of them as they think fit, when they come to make a new settlement of their crown : which privileges appear to have been as follows :

I. *The Power of the States to resist the Sovereign if he invade the Constitution.*

If the King or Queen broke in upon our constitution, or violated the liberties of their subjects, so as to endanger the subversion of our government, it was no treason in the three estates, or those commissioned by them, after all the other methods of petitions, remonstrances, &c. proved unsuccessful, to take arms against their Princes, or those that were commissioned under them, for asserting and recovering the liberties of the nation.

This no doubt will seem extravagant to those who have never read our ancient statutes, and to such as are possessed with a false notion by some of our prerogative authors, That our Kings were always absolute, and accountable to none but God Almighty. But the following acts of parliament may shew them how little those men's authority is to be relied upon.

Parl. 6th James II. held at Edinb. Jan. 19, 1449, cap. 44. intituled, *Sundry Points of Treason*, in the Acts printed by Sir Thos. Murray; but in the Black Acts, printed by Robt. Lekprivick, it is cap. 25. and intituled, *That na Man do Treasoun to the King's Majesty*, and is as follows:

“*Item.* It is statute and ordainit, that gif any
“ man, as God forbid, committ or do tresoun againis
“ the Kingis persoun, or his majestie, or rysis in feir

“ of weir againis him, or layis hands upone his per-
 “ son violently, what age the King be of, zoung or
 “ auld, or resetis ony that hes committit tresoun,
 “ or that suppleis thame in help, red, or counsal, or
 “ that stuffis the houses of thame that are convict
 “ of tresoun, and haldis them againis the King ; or
 “ that stuffis the housis of thair awin in furthering
 “ of the Kingis rebellis, or that assailzies castellis
 “ or places, quhair the Kingis persoun sall happin
 “ to be, without the consent of the thre Estatis, sall
 “ be punist as traitouris.”

This exception [*without the consent of the three Estates*] clearly evidences that though they made it treason to make war upon the King without their consent, yet they would not have a war, made by their consent, to infer that guilt or punishment. But this will appear yet more plain by the following act, in the case of King James the 3d, Son to this King James the 2d, about 39 years after the making this act.

Parl. 1 James IV. held at Edinb. Oct. 6, 1488,
 cap. 14. intituled, *The Proposition of the
 Debate of the Field of Striviling.*

“ *Item.* In this present Parliament our Sove-
 “ rane Lord beand present, togidder with his Thre
 “ Estatis of the Realm, was proponit the Debait
 “ and Cause of the Field of Striviling, in the quhilk
 “ umquhile James King of Scotland, quhome God
 “ assolzie, Father to our Soverane Lord, happinit
 “ to be slane, and the cause and occasion thereof

“ commonit oppinnit and arguit amang the Lords
 “ of the Thre Estatis, John Lord Glammiss pre-
 “ sentit, and schew certane articlis subscrivit with
 “ the said umquhile King James hand, the tennour
 “ of the quhilkis followes, &c. the quhilkis beand
 “ read, and schawin, that the saidis articlis was
 “ divers tymes grantit to, and broken be perversit
 “ counsal of divers persounis being with him for
 “ the tyme, quhilkis counsallit and assistit to him in
 “ the inbringing of Inglismen, and to the perpe-
 “ tual subjection of the realme, and under dissait
 “ and colour maid, and refusit; and that our Sove-
 “ rane Lord that now is, ever consentit for the
 “ gude of the realme, and the commoun profit
 “ thereof (for the quhilk the Erle of Huntly,
 “ the Erle of Errol, the Erle Merchal, the Lord
 “ Glammiss, and uthers diverse Barronis, and uthers
 “ the Kingis trew Liegis left him, and his dissait-
 “ ful and pervers’d counsal, and adherit to our So-
 “ verane Lord that now is, and his trew opinioun
 “ for the commoun gude of the realme) the quhilk
 “ matter beand schawin, examinat, commonit, and
 “ understanding be the Thre Estatis, and the hail
 “ body of the Parliament, that ryplie avisit, decla-
 “ rit and concludit, and in their lawties and allegi-
 “ ance ilk ane for himself declarit, and concludit:
 “ That the slaughtre committit and done in the
 “ Field of Stribeling, quhair our Soberane Lordis
 “ Father happinit to be slane; and uthers divers his
 “ Barronis and Liegis, was allutterly in thair de-
 “ fault, and colourit dissait don be him and his per-
 “ versit Counsal, divers times befor the said Field.

“ And that our Soberane Lord that now is, and the
 “ trew Lordis and Barronis that was with him in
 “ the samin Field, war innocent, fre, and quyte of
 “ the said slaughter done in the said Field, and all
 “ persuit of the occasion, and cause of the samin;
 “ and that pairt of the Thre Estatis, foresaidis,
 “ Prelatis, Bischoppis, Great Barronis, Burgessis,
 “ gaif their Seillis heirupone, togidder with our
 “ Soverane Lordis Great Seil, to be schawin and
 “ producit to our Haly Father the Pape, the Kingis
 “ of France, Hispanzie, Denmark, and uthers
 “ Realms, as sall be sene expedient for the tyme.”

This act was so full to the purpose, that by order of King James VI. as it is supposed, it was left out of the acts reprinted in his time, and the like out of all those that have been printed since; but it was published among those that were printed by order of his mother, Queen Mary, commonly called the *Black Acts*, because printed in a black letter, from whence this is taken *verbatim*.

I know it is objected, that these acts were obtained from Princes during their nonage, and therefore are not to be drawn into consequence. To which it is answered, That King James II. was nineteen years of age at least when the first mentioned act was made, a season when Princes are apt enough to enquire into their prerogatives, and tenacious enough to maintain them: And King James IV. when that act passed which condemned his father as being the cause of his own death, was sixteen years of age, and of such a capacity, that

the States thought him fit to sit on the throne ; as appears by their last message to King James III. who being so void of faith that they could not trust him, they sent him word that there was no other way to accommodate matters, but to resign the crown to his son ; which he not thinking fit to comply with, it hastened his fate. Besides, it is known to be the constitution of Scotland, that our Kings may revoke any thing they have done to the damage of their crown during their minority, when they come to full age, which is twenty-one ; but though King James the 2d lived till he was twenty-nine, and King James the 4th died in the twenty-fifth year of his reign, they did neither of them attempt to repeal those acts. They were both of them Princes of courage, and of excellent natural endowments ; and therefore had they thought it just and practicable, would certainly have tried it ; especially King James IV. who, according to the superstition of the times, was afterwards prevailed upon by the Priests to wear an iron chain about his middle, as an evidence his father was killed against his will : but he never offered at abrogating the act, for he knew too well that the common law of the kingdom was for it, and that the Estates were authorised by former precedents, particularly by that of parliaments making war upon Baliol, and pulling him down from the throne for betraying our sovereignty to the English ; and by the declaration of the Estates to the Pope, that as they had set up Robt. Bruce on the throne in Baliol's stead, they would depose him too,

if he followed the same measures : and indeed they were so little accustomed to arbitrary government, that though they had all the deference imaginable for the said King Robert, as the deliverer of his country, and the greatest captain of his time ; yet, when by the advice of some greedy courtiers, he was influenced to demand in parliament, that every man should produce the rights by which he held his lands, they took it so ill, because he knew that most of them were destroyed during the war with England, and Baliol's faction, that every man drew his sword in his presence, and told him, they held their lands by that right. He dared not to resent this, though he was very angry at it, but without just reason, for he held his crown by no other tenure : it was by those very swords that he obtained it, and it was by their authority that he kept it.

In this place it is likewise proper to take notice of the parliament's obliging King James the 3d to stich the Earl of Morton's charter upon the throne, where he tore it in a tyrannical manner, because of the large royalties and privileges it contained ; and particularly, that in certain cases there should be no appeal from the said Earl, which that Prince thought was a privilege fit for none but a king.

But to put this objection from the nonage of our kings to perpetual silence, those who think there is any weight in it, ought to consider, that though the kings of Scotland may sometimes happen to be under age, the three Estates can never be so ; it was their act and deed : and whether our kings were young or old, they had no negative

voice in those days, and therefore could not refuse to pass what the States had enacted: but of this more anon. Besides, it was not in the reigns of these two kings alone, or only when our Princes were under age, that the three Estates laid a claim to the power of calling our kings to an account for breaking in upon the constitution: it had been their constant practice from the very foundation of our monarchy. It were easy to prove this by many particular instances from our history, but we shall content ourselves with a late one of unquestionable authority.

The Estates of Scotland, in the beginning of James the 6th's reign, sent the Earl of Morton, and other commissioners, to Queen Elizabeth, to justify their deposing his mother, Queen Mary; and in their memorial for that end, did plainly assert their right of calling their kings to an account, as an unalterable law. A part of this memorial, as reported and approved in the convention at Stirling, upon the return of those commissioners from England, we shall give an account of, from Buchanan, as follows:

“The *Scots* being originally a free nation,
 “created themselves kings on this condition, That
 “the power they were intrusted with by the suffrage of the people, might be taken from them
 “by the same authority, if occasion required.—It
 “appears likewise by the ceremonies in practice at
 “the inauguration of our kings, when a mutual
 “stipulation is sworn to by the Prince and people.

“ This is also manifest by the inviolable tenor of
 “ our law, from the beginning of our monarchy to
 “ this very day ; for no man ever attempted to have
 “ it repealed, or any way lessened : and though our
 “ ancestors have dethroned, banished, imprisoned,
 “ and executed so many kings, that it would be
 “ tedious to rehearse them, yet no man ever com-
 “ plained of the severity of this law, or talked of
 “ restraining its force : For it is one of those sanc-
 “ tions that are not subject to the mutations of
 “ time, but engraven in the minds of men from the
 “ very creation, approved by the unanimous con-
 “ sent almost of all nations, and must continue
 “ inviolable to the end of the world.”

King James VI. himself, after he came of age, confirmed by acts of parliament all that had been done by the three Estates during his nonage, and annulled all that been done against it by his mother's authority ; though he had as much kingcraft, and as great an itch after arbitrary power as any of his predecessors.

The nearer we approach to the fountains and origin of our government, the more strong and clear shall we find the streams of our liberty. Our kings have in time of peace been summoned to appear before their parliaments, to answer for their mal-administration ; for instance, Culenus, our 79th king : and when any of them happened to be guilty of capital crimes in their own persons, they were liable to the law as well as others. This is evident from the instance of Eugenius VII. who was brought to his trial for the supposed murder

of his own wife ; and from many other instances. Our ancestors thought there was no reason that the subject should have remedy at law against the king, if injured by him in his estate, and yet be left without remedy when injured by him in matter of life. Much less did they think it reasonable that a particular subject should have the benefit of the law against his Prince, when injured by him in his person or property, and that the whole subjects should be left without relief when a tyrannical Prince invaded their constitution, and would take upon him to dispose of their lives and fortunes at his pleasure. Our forefathers never dreamed of any such government. Their monarchy was only an office of trust conferred upon the Prince, in conjunction with the three Estates, who had a share with him in all those things which politicians call *jura majestatis*, as the power of making laws, the power of raising money, the power of peace and war, the power of making leagues and treaties, the power of making officers of law and state, and a joint power in the whole administration, as shall be fully proved afterwards. This ought for ever to stop the mouths of foreigners, or others who are so liberal in their censures upon our nation, and reflect upon us as having been always rebellious and disloyal to our kings ; for these reflections have no other foundation but malice, or ignorance of our constitution. This serves also to take off that common and seemingly weighty objection, that our kings being the fountain of all power and jurisdiction, could not be tried by courts who derived

their power from them : for, as to our nation, it is a mistake in matter of fact ; our kings derived their power from the states of the country, as is evident from our histories in the first foundation of our monarchy, and in all the several revolutions of it since that time. It is no less evident from our acts of parliament, that though the administration was in the king's name, yet the sovereignty was lodged in him and the three Estates. This appears by their having a joint share with him in all the *jura majestatis*, as has been already mentioned : and therefore when he invaded the constitution, and upon that account was called to the bar of the three Estates, he was brought in judgment before his superiors, if three parts of the sovereignty be superior to one, and if those who gave the power and authority be superior to him that received it. Besides, when he became a criminal, he made himself subject to those very laws which were ratified by the touch of his own sceptre, and of those of his ancestors. So that in his personal capacity he was judged by himself in his politic capacity, and in effect condemned by his own mouth, which gave the royal assent to the laws that he had transgressed.

This will not in the least justify the illegal trial, condemnation, and execution, of King Charles I. in England, since the parliament there had voted his concessions to be a sufficient foundation for a treaty ; and since our whole nation opposed those proceedings against him ; so that, admitting what he was charged with to have been true, it was *coram non judice*, and therefore the whole proceeding was an act of force and tyranny.

II. The King of Scots had no negative voice in Parliament; but the Estates had a commanding power in all matters relating to the Government, and he could do nothing in those matters but by their advice.

The 2d thing humbly proposed to the consideration of the Parliament of Scotland is, that, in the next act of settlement, they should deliberate, whether it be fit to have their ancient privilege restored, that what passes the three Estates be confirmed as a law, by the touch of the Sceptre, without the King's having a negative voice. Not that he should be obliged to act by an implicit faith; he may be allowed to propose his reasons against any act that is offered; but if those reasons be not satisfactory to the states, and manifestly tend to the advantage of the country, his negative ought not to hinder their passing into a law. This was our old constitution, and while our Estates retained three parts of the Sovereignty in their own hands, it could not be otherwise; they might conclude the King, but he could not conclude them. Had it not been so, we must have been ruined by King James III. and others of our tyrannical Princes; nor had we ever been blessed with a Reformation established by law. It is well enough known that Queen Mary and her husband, the King of France, refused to give their assent to the acts establishing the Reformation; but, being enacted in a Parliament legally assembled, they had the force of a law notwithstanding. And though

she was by her own inclination ready enough to assert her prerogative, and confirmed in that principle by her education in the Court of France; yet she was so far from usurping a power to casse and annul those laws, as her great grandson King James VII. did, that she never so much as pretended to it. On the contrary, she humbly intreated her nobles and others so far to dispense with them as to allow her a private mass in her own palace.

This petition of hers was no new or unprecedented thing in our Princes, nor was it owing to the weakness of her sex, or the danger of her circumstances; but the natural result of our noble constitution, which allowed our Kings to petition the Estates in matters relating to the administration, but not to command them: and therefore we find it thus expressed in the acts of King James I. cap. 125. *Item Dominus Rex obtinuit per modum Requestus, i. e. Our Lord the King obtained by way of Request: And this Request was, That the Prelates and Barons should not remove the Husbandmen from their farms, not yet let to others, for the year to come, except they had a mind to take them into their own hands.* In the acts of King James II. cap. 62. they say, *It is thocht Speidful, that the King make Requeist to certain of the Greit Burrowis of the Land that are of ony Mycht, to make Cartis of Weir, and in ilk Cart twa Gunnis, &c.* These are left out of the late editions of our acts, because they did not sute with that towering prerogative we have had paumed upon us since the Union of the Crowns, but are still to be found in the Black Acts formerly mentioned.

We would wish these Gentlemen, who have taken the liberty to declare by word and writing, that our Parliaments were antiently no more but the King's Baron Court, to bethink themselves whether Barons use in this manner to petition their vassals, and whether vassals have any power to order their superior to petition them, and to turn him out from his estate, if he do not fulfil the conditions of his grants ; or whether it was originally their gift, or his own property.

But to return to the negative voice, what is here asserted concerning it has been frequently denied by our Royalists since the Union of the Crowns ; but one of them more ingenious and knowing than the rest, hath owned it in a paper called, *An Essay upon the Disorders of Scotland*, subjoined to a short narration of the state of affairs in Scotland at the down-sitting of the Parliament, 1661, sent by the Earl of Middleton to King Charles II. and now lately published at London in a book called *Miscellanea Aulica* ; so that it is probable the said Earl may have been the author of it. But however that be, it seems highly reasonable in itself, that our Parliaments should reassume that authority, when the present entail of our Crown determines. Had they re-possest themselves of this at the Revolution, we had not suffered so much in our lives, estates, and reputations, as we have done by the affair of Caledonia ; and we should, at this time, humanly speaking, have been in possession of that important isthmus, which would have made us more considerable in the eyes

of Europe than any thing else that ever we undertook since a nation. There were other things relating to our constitution, wherein we suffered during the last reign, for want of that privilege; but it is hoped this is enough to satisfy the thinking part of the nation of the necessity that our parliament should reassume that power. If we suffered so much for want of it in the reign of King William, whom we must justly reckon to have been one of the best of our Kings, what may we suffer for want of it in such reigns as that of Charles II. and James VII? Let us turn over to the long roll of our Kings, bound up with our acts of Parliament, and consider, that of 110 of our Princes, there are 33 stigmatised with the odious epithets of bloody, cruel, greedy, lecherous, vicious, tyrannical, foolish, usurpers, &c. And if we may give credit to what is said by Buchanan and others of our historians, or if we may be allowed to speak what the nation has experienced within this last 100 years, it can scarcely be charged with falsehood, if we add near half a dozen more to the number. I was not able to forbear smiling, when I read the 134th act of the 8th Parliament of King James VI. against Slanderers of the King's Progenitors, &c. which was directly levelled against Buchanan's history, and at the same time found the list above-mentioned, which gives those characters of so many of his progenitors, bound up and printed by authority, with our acts of Parliament. *Magna est Veritas et prevalebit.*

Then since the matter is thus, and that, according to this calculation we cannot say we have had

one good Prince in three among those that are past, and have no reason to promise ourselves that it will be otherwise among those that are to come ; what wise nation would put it in the power of any Prince to refuse the passing of good laws, when they are laid before him by the States ? Our ancestors were so far from allowing their Princes any power of this nature, that it never appears to have been claimed by any of them before the Union of the Crowns.— Hence it is that so many of the laws in the time of the five James's, are enacted in the name of the states, without any mention of the King : In some of them they are many times mentioned before him, and in others they plainly direct, not to say command their Kings in the weightiest affairs of the administration. Thus we find in the acts of James I. cap. 25. the States determine and ordain, that the King shall *gar*, i. e. cause mend his mony ; and cap. 49. that the King shall command all judges to do full justice, and appoint advocates to plead poor people's causes ; and cap. 50. they ordain, where the King gives remissions, that the injured party have satisfaction. In the acts of James II. cap. 1. they ordain the King to be in or near the town where the justice air is kept. Cap. 6. they conclude, that the King shall ride through all the realm, upon advice of any rebellion, slaughter, burning, robbery, &c. ; and that he call for the sheriff, and see the injured parties redressed, before he leave the place : And cap. 102. they exhort and require him to a diligent execution of the statutes, that God and his subjects may be pleased with

him. In the acts of King James III. cap. 80. they tax the King with slothfulness in not putting the laws in execution for the bringing in of bullion and keeping money in the kingdom; and order, that he shall yet cause the said statutes sharply to be put in execution, and that he shall now depute true and able persons to be searchers. Cap. 100. they obtained his promise to cause justice to be equally administered by the counsel of his Prelates and Lords: And in the acts of King James IV. cap. 6. they concluded that the King shall ride about in person to administer justice, and be present at his justice airs. In the acts of King James V. cap. 38. we find that Prince, though he had a large share of the courage and ambition of his uncle King Henry VIII. of England, pay so much deference to the constitution of his country and the dignity of the three Estates, that he told them by his advocate, *He intended not to move or do any thing, but what he might justly do by their advice.* The occasion of this is very remarkable, and sets the ancient authority of our Parliament still in a clearer light; therefore we shall exhibit the act itself (which is called the Declaration of Parliament) at large.

“ The quhilk day, Master Henry Lauder, advocate to our Soverane Lord, exponit in presence
 “ of the Kingis Grace, and Thre Estatis of Parliament, how that his Grace had raisit summoundis
 “ upon the airis of Umquhile Robert Leslie, to heir
 “ his name and memorie deleit and extinct for cer-

“ tain punctis and crimes of Lese Majestie commit-
 “ tit and done be him or his deceis, and thairfor all
 “ his gudis, movabill and unmovabill, perteining
 “ to him, the time of the committing of the said
 “ cryme, and sensyne, to be decernit to pertene to
 “ his Grace. And because it is murmurit, that it is
 “ ane noveltie to raise summoundis, and move sic
 “ agains ane persoun that is deid (howbeit the com-
 “ mon law directlie provydis the samin) not the
 “ les for stanching of sic murmure, and that his
 “ Grace tends on ne sort to move or do ony thing,
 “ bot that he may justlie be the advise of the Thre
 “ Estatis. Thairfor desyrit the saidis Thre Estatis
 “ to avise thairupon, and that his Grace may have
 “ the censement of Parliament, quhither that he
 “ has an action, to pursue sic summoundis or not.—
 “ The hail Estatis spiritual and temporal, and Com-
 “ missaries of Burrowis, all in ane voice, but vari-
 “ ance or discrepance, hes deliverit and concludit,
 “ that his Grace hes gude just cause and actioun to
 “ persew the said summoundis, and all uthers sic-
 “ like summoundis of tresoun, done and committit
 “ agais his person and commoun-weil conform to
 “ the common law, gude equitie and reason: Not-
 “ withstanding thair is na special law, act, nor pro-
 “ vision of the realm maid thairupon of befoir.”

Thus this valiant and high-spirited Prince
 owned himself to be obliged to do nothing but
 with the advice of the parliament, even in such
 cases as this, that were ruled by the common law.
 He knew the constitution of the government to be

so, as indeed it must evidently appear to those who consult our statute books; for by them it is manifest that from the highest acts of sovereignty, such as making peace or war, to the very lowest acts of common police or discipline, such as forbidding people to play at foot-ball, and taking order about the building of rooks on trees, and burning of heath,* the Kings of Scotland could do nothing without the concurrence of the three Estates; and in all new cases, even such as seemed to relate to ceremony, or what the custom of the times made common decency, they could do nothing but by their authority, no not so much as grant a charter to a bishop to have a silver rod carried before him.† This is matter of fact, and the reason of it is evident; our Kings had their power originally from the Estates, and in all new cases were obliged to have recourse to their advice. They were sharers with them in all acts of sovereignty; they had a negative upon the King, though he had none upon them, because they were the majority; and therefore in their laws and statutes they speak as sovereigns, and command their Princes in what related to the administration. Since the union of the crowns indeed, this would have been looked upon as an assuming, if not a rebellious, style: But our ancient parliaments understood their interest, and the nature of our constitution better; they knew they could not answer it to themselves, and to the

* James I. Parl. 1. cap. 17, 19, 20.

† James III. cap. 87.

people from whom they had their commissions, if they did not take effectual care that their Princes, whose office was only a power of trust, should be faithful in the discharge of that power which they had entrusted them with.

I know it is objected against this by our royalists, *That our Parliaments derived their power from the King; that the Lords of the Articles were a check upon them, and that they were only to treat of such articles as the King proposed, and gave in to those Lords.* To the first part of this it has been answered already, that our histories, in all the turns of our State, from first to last, make the contrary evident. As to the Lords of the Articles, they were only a committee of each Estate chosen by themselves to prepare matters, and to determine upon the articles proposed by the King; but the Estates were at liberty to recede from those proposals, and their determination upon them, as they themselves thought fit; which fully proves that the Estates had a negative upon the King. This is evident from the preface to the acts of King James I. where it is said, *Electæ fuerunt certæ personæ ad Articulos datos per Dominum Regem determinandos, data cæteris Licentia recedendi;* but this is left out in the late editions of our acts, because it was not consistent with that arbitrary power which some of our late Princes assumed since the union of the crowns, and contrary to the use which after that time they made of the Lords of the Articles, and therefore they were abolished after the revolution, as an intolerable grievance. That the mem-

bers of parliament, by themselves, or their speaker, had power to propose what was thought meet and necessary for the common-wealth, is likewise evident from the act of James I. cap. 112. in the old acts, and 102. in the new. Besides, these Lords of Articles were never heard of till the time of David Bruce; nor was there ever any statute-law enjoining them, or to determine their power and manner of procedure; there were likewise several parliaments after the time of the said David Bruce, which had none of those Lords of the Articles; and when they were in use, they were named and chosen by the advice and consent of the whole parliament, till the year 1617, that the bishops took upon them to remove out of plain parliament to the inner house, and chose some out of the noblemen, and the noblemen them, and they two chose the commissioners of the articles of the shires and burghs, as may be seen in the representation of the proceedings of the kingdom of Scotland by the Estates, ann. 1640, p. 21. From all which, it would seem that the articles delivered by the Kings, were instead of the speeches now in use by themselves, their commissioners, or chancellors, which proposed what was thought fit to be done on the part of the crown, but did not hinder the parliament from proposing also what they themselves thought fit to propose for the benefit of the country.

It being evident, as hath been said already, that the three Estates were sharers of the sovereignty, it was an indispensable and necessary result of such a constitution, that parliaments should not only be frequent and certain, but *continual* by themselves

or their committees, otherwise our government must have been lame, and three parts of the sovereignty wanting at times.

III. *The Parliament had a Power to appoint the Times of their Meeting, and Adjournment, and Committees of their own number to superintend the Administration.*

Therefore it is proposed in the third place, that the Parliament of Scotland, in the next act of settlement, should consider whether it be fit to ascertain their meeting once per annum, or oftener, *pro re nata*; that it should not be in the power of the King or Queen to adjourn them without their own consent; and that they should appoint committees of their own number to sit during intervals, to superintend and assist in the administration, and to be accountable to them at the next meeting; and that before the parliament break up, the time and place of their next meeting should be appointed.

It appears to have been our ancient privilege, though not always duly observed, to have annual parliaments, and sometimes they met twice per annum. Thus, in the thirteen years of King James I.'s reign, we had fourteen parliaments and general councils: and annual parliaments appear to have been our right, by the acts of James I. cap. 112. ratified by James VI. parl. 11. cap. 113. And in the acts of James I. cap. 125. we find the parliament which met at Perth on the 26th of April, 1429, adjourned by the king, with their own con-

sent, till Martinmas the winter following. Cap. 145. we find the parliament which met at Perth on the 30th January, 1430, adjourned likewise to the feast of St. Michael next that same year. In the acts of James II. cap. 22. we find the meeting of the parliament appointed to be at Perth. Cap. 38. the parliament met at Edinburgh on the 26th of Aug. 1442, orders another to meet there on the 28th of March following; and all the prelates, barons, freeholders, and others that owe presence there, to appear to commune, treat, and conclude upon such things as are profitable and convenient for the realm. Cap. 42. we find the parliament which met at Edinburgh, June 9, 1455, continued with their own consent to the 4th day of August following. Cap. 52. we find the parliament met accordingly, and again continued, by their own consent, to the 12th day of October next.

In the acts of King James III. cap. 61. we find the parliament which began at Edinburgh, on the 6th day of May, 1471, continued, by their own consent, to the 2d day of August next. And, cap. 75. we find the parliament which began at Edinburgh, May the 9th, 1474, continued, by their own consent, to the 6th day of August next. And this privilege is owned and assented to by King James VI. who, in his letter from England to the Lord Balmerinoch, his secretary, dated May 6, 1604, ordered that the Estates should continue the parliament.* And indeed it seems altogether unrea-

* Representation of the Proceedings of the Kingdom of Scotland by the Estates, 1640.

sonable, that the King or Queen should have the power to adjourn or dissolve parliaments at pleasure, which are the great barrier for the people's liberties, and the supreme court for doing justice to the whole nation, when they have not power to adjourn the ordinary courts of justice without the consent of Parliament. It is, however, very observable, that all these acts of parliament relating to the consent of the three Estates, as to the time of their meeting and adjournment, are left out in the edition of the acts printed by Sir Thomas Murray ; so careful were our late courts to remove all the ancient landmarks of the power of parliaments.

Then as to committees of parliament during intervals ; in the acts of James I. cap. 72. we find that the King, with consent of parliament, appoints his chancellor, with certain persons of the three Estates, to sit for administration of justice three times per annum ; which times are appointed in the following chapters.

Cap. 85. we have an account of articles, points, and causes, determined by the King, and committee of parliament, which was chosen by the three Estates, in the parliament at Perth, March 16, 1425.

Cap. 89. and following, we have a report of what the King and committee of parliament had communed and ordained, as to certain statutes profitable for the common good of the realm, according to the ordinance of the three Estates, in the parliament held at Perth in October foregoing.

In the acts of King James II. cap. 22. a committee of the three Estates is appointed to examine the acts made in the time of that King and his fa-

ther, and to make their report in the next parliament to be held at Perth, of such as they find good and convenient for the time.

Cap. 77. A committee of parliament is named and appointed to meet in the Exchequer, to commune upon the matter of money for the profit of the realm.

In the first parliament of King James III. held at Edinburgh, Oct. 9, 1466, cap. 2. a committee is appointed to commune upon the marriage of the King, his sister and brothers, upon the annual of Norway, and upon those that held the kings and my Lord of Albany's castles from them: and this committee had power to authorise, ratify, or annul, all acts and statutes communed in the sessions of burghs for the good of merchants and profit of the realm; which power was to continue till the 1st of February following.

Cap. 52. It appears there was a committee appointed having the whole power of the three Estates, to order matters relating to the administration of justice; and that they ordered the prelates and barons to make carts of war, that is, carriages with great guns, for the defence of the realm.

Cap. 57. That same committee ordered the money to have course upon the present footing, until the meeting of the parliament, that another committee should be appointed to determine that matter.

Cap. 61. A committee is there named, having the power of the whole parliament, to determine, treat, and conclude, as in their wisdom they should

find meet, concerning matters relating to the welfare of our sovereign Lord, which were proposed in that present parliament, but not concluded, and other matters that should occur for the time, for the welfare of the King, and the common good of the realm.

Cap. 75. The power of the three Estates is given to a committee of twenty-four of their own number, to advise and conclude upon matters that should occur in the meantime, and particularly of the money, with power to adjourn the parliament to another day, if they thought it needful, they themselves having adjourned it to the 6th day of August.

Cap. 97. The Estates, for sparing their own labour and travel, committed their full power to twenty-four of their own number, to commune, advise, and conclude upon an embassy to be sent to the King of England, about his marriage with the King's sister, and about summoning and trying the Lord of the Isles, and Sir Alexander Rait.

In the acts of King James IV. cap. 8. a committee is appointed for putting a stop to theft, robbery, and other enormities, and to bring the persons guilty of those crimes to justice; for which they gave their oaths to the King in parliament: and this power was to continue till his Majesty attained the age of 21. This committee being appointed to continue so long, we are not to wonder that we hear of no more during this reign, for the King not many years after entered into a war against England, in which he fell.

In the reign of King James V. the institution of the college of justice with the consent of parliament, who named the Lords of the Session, regulated their methods of proceeding, and superintended the same from time to time, rendered those committees in a great measure needless. Besides, his French match, and that of his daughter Queen Mary, brought in too much of the French mode of government, as it has ever done in all other nations who have been so unfortunate as to have their Princes marry into the French line: but we have seen already, by King James V.'s own concession, that he could do nothing of his own power, without the consent of parliament; and it will be further evident, from other instances we shall have occasion to mention, that the three Estates abated nothing of their original power in the reign of himself or his daughter.

In that of King James VI. we find those committees of parliament again brought in use. Thus, in the table of the acts of his 9th parliament, which are not printed, we find committees appointed for discussing articles proposed in parliament, and for erecting the college of Aberdeen. And in the table of the acts of his 11th parliament, which are not printed, we find committees appointed concerning the coinage, about a tax for the King's marriage, for establishing universal measures and weights, for the satisfaction of the clergy for their life rents, about the priority of places and voting in parliament; and others to treat for the defence of the realm in the time of war, for regulating the

quantity of bullion to be brought into the mint, for better execution of justice, and for considering the acts of parliament. In the like table of acts of his 12th parliament, we find committees mentioned upon several occasions; and also in his 13th, 16th, 17th, 18th, 19th, 20th, 21st, 22d, and 23d, which was his last; though here we must observe, that all those acts relating to the committees of parliament in former reigns, are left out in Sir Tho. Murray's edition.

THE ANCIENT CONSTITUTION OF THE PARLIAMENT OF SCOTLAND.

IV. *A 4th thing proposed to the consideration of the Parliament of Scotland is, to take a view of the Ancient Constitution of that Supreme Court, and to consider what part of it is fit to be restored.*

It appears by our statute books, that formerly all barons and freeholders came in person to parliament, and were obliged to do so by their holdings. This is supposed to be one of the reasons why some late authors have presumed to assert, that our parliaments were anciently the King's baron courts, but it is a palpable mistake; for the reason of it appears to have been, that they who had a fixed and certain interest in the kingdom, were judged to be the most proper and fit persons to *meet, commune, treat, and conclude, upon such things as were profitable and convenient for the realm.* This is

plainly implied and asserted to be the end of their meeting, in the acts of James I. cap. 49, and 112.; James II. cap. 38.; James III. cap. 106. Nor can it in reason be thought to have implied any thing of a servile tenure, since legislature and taking order in matters relating to the administration, are acts of sovereignty. And we find, as has been already said, that our parliaments in ancient times never looked upon themselves to be the King's servants; so that it plainly appears that those tenures, if they must be accounted servile, were only to serve themselves and their country, and no other way to serve the King, but as his service fell in with that. This is plain from the preface to the parliament of Robert I. where it is said they met about the various and arduous affairs that did concern or might concern him and his kingdom, for the honour of God, and of our holy mother the Church, for the bettering of his country, the defence of his people, and to maintain and confirm the peace of his country.

In those times, they were far from thinking that the only end of parliaments was to raise money for the King, and to support his prerogative and grandeur. They did indeed from time to time limit and ascertain his prerogative, and did the King justice in the matter of his revenues and the patrimony of the crown, as well as they did justice to the subjects: but it is as evident that they had an uncontrollable power to annex or dissolve from the crown as they thought fit; and that the sole end of those annexations or dissolutions was the public

welfare, and the defence of the kingdom, without any regard to the person of the King, but in so far as it fell in with those ends, as we shall have occasion to see afterwards. But that baron courts have, or ever had any such power over the estates of their landlords, let those who have endeavoured to degrade the authority of parliaments by that similitude, prove, if they can.

To return to the barons and freeholders, it is evident that they are the far greatest part of the substantial body of the kingdom, and by consequence most concerned in its preservation and prosperity; and therefore, generally speaking, they have all along been truest to its interest, because their own interest and that of the nation is inseparable. For if the common people be diminished by famine, sword, plague, or by the oppression of the Prince, the barons and freeholders are the immediate and most sensible sufferers by it: their lands, how large and fruitful soever, are of no use to them, if not tenanted; and when that happens to be the case, they are in a worse condition than those whose stock is in trade, for that is removeable to other countries, and may be improved by foreign commerce, in case of any of the domestic calamities before-mentioned: but the barons and freeholders cannot remove their lands, therefore it is their principal concern to guard against all such things as may lessen or discourage the people. From all which it naturally follows, that they ought to have the greatest share in the legislature. This our ancestors thought reasonable, and therefore all barons

and freeholders appeared personally in parliaments and general councils ; and to this we must justly ascribe the preservation of our freedom and liberty for so many centuries. It was impossible for any designing Prince or court either to bribe or force so many gentlemen into measures that were destructive to their country ; and therefore, according as this practice grew in disuse, our Princes grew in their prerogative, which hath reduced our country so low as it is at present.

The first time we find them dispensed with from coming to parliament is in the acts of King James I. cap. 112. and the reason was, that many of them were not able to bear the charge of it.* So that instead of all of them being obliged to appear in person, they were at the head court of each shire to chuse two or more wise men, according to the largeness of each shire, except Clackmannan and Kinross, who were each of them to chuse but one ; and these commissioners of the shires were to have their charges born by the electors, and to *chuse their speaker, who was to propose all things pertaining to the commons in parliament.*

By this it is evident, that the medium of adjusting the proportion that each shire was to have in the legislature was their largeness, by which must be meant their populousness, and the share they bore in the public burdens, there being no reason that the shire of Nairn, which pays but 277l. as its proportion of a public tax, should have as many to

* Sir George Mackenzie's Institution of the Law of Scotland, p. 13.

represent it in parliament as the shire of Ross, which pays 1131l.; that Cromarty, which pays but 214l. should have an equal share in the legislature with Inverness, which pays 1213l.; or that Bute, which pays but 308l. should have as many representatives as Renfrew, which pays 1353l. and so of the rest. In like manner as to the burghs, it is not reasonable that Whitehorn, which pays but 8l. should have as many representatives in parliament as Glasgow, which pays 1800l. or that Inverbervie, which pays but 6l. towards a public tax, should have as many as Perth, which pays 360l., and so of the rest.

Something towards a remedy of this, as to the counties, has been done since the revolution, by the 11th act of the Earl of Melville's parliament, upon the ground laid down in this act of King James I, which is there referred to, and assigns the reason to be the largeness, extent, and value, of the lands held by the barons and freeholders in those shires: but it may justly deserve the consideration of our parliament, whether more of this ought not to be done, both in respect of the counties and burghs.

By this means the nation should be more equally represented, and it would not be so easy for any future Prince to influence our parliaments, as sometimes they have done, to fall in with such measures as are prejudicial to the kingdom: at the sametime it would do justice to the barons and freeholders, who had a right to come to parliament themselves, that the number of their representatives should be

enlarged. Perhaps it may deserve consideration, whether all of them whose estates will bear the charge, should not be restored to that right, which seems not to have been entirely taken from them till the reign of King James VI. for in that of his mother, Queen Mary, we find all of them to have been present in parliament when a war was agreed on against England, as appears by the 3d chapter of the parliament held at Monkton-hall; and that the 112th chapter of King James I.'s acts did not deprive them of that privilege, but only freed them from the fine they were formerly liable to for not attending in parliament, is evident from this, that we find them mentioned as present at several subsequent parliaments, viz. the very next, which was held at Perth, April 26, 1429. We find them again in the parliament held at Edinburgh, in the reign of King James II. July 14, 1455. And in another parliament, held there in 1449, we find the freeholders of regalties in the King's hand, ordered to appear in parliament as well as those of royalties. The freeholders were likewise present at the parliaments held in Edinburgh, August 6, 1452, and Aug. 4, 1455. And in the acts of King James II. collected by Sir Thomas Murray, parl. 14. cap. 75. we find, that no freeholder who held of the King under the sum of 20l. should be constrained to come to parliament, or general council, except he be a baron, or specially warned by the King. By which it is evident, that all barons were still obliged to attend in parliament. We find no mention of the freeholders in any of the parliaments of King James

III. who was a tyrannical Prince, and in all probability improved his grandfather's act, dispensing with their presence, to hinder their coming; but in the reign of his son, King James IV. cap. 113. we find it enacted, that all barons and freeholders, above the extent of 100 merks, should come in person to parliament, on pain of the old fine; while those under that extent were excused on sending their commissioners. So that this must be understood to have been the constitution of our parliament till the time of King James VI. Nor do we find any law in his time, or since, that expressly abrogates the same: for the 113th act of his 11th parliament relates to the commissioners of small barons and freeholders, and only relieves the remainder of the small barons and freeholders from their presence in parliament; but does not exclude the barons and freeholders above the extent of 100 merks from coming to parliament. The 272d act of his 15th parliament takes order indeed that no barons be received as commissioners of any shire, except they produce commissions granted to them in a full convention of the whole barons of the shire. It is true, this seems to imply, that those commissioners must represent all the barons, yet it does not expressly say so; and since it enjoins that the commission must be authorised by the subscription of a great number of the barons then present, and not by all, or the majority, it leaves room to conjecture, that the great barons were not by this act deprived of their privilege of coming in person, especially considering the before-mentioned act of

King James IV. that expressly enjoins their coming.

The 35th act of the first session of the first parliament of King Charles II. only regulates the elections and charges of commissioners from shires, but does not expressly forbid the appearance of the great barons in person. So that the 113th act of King James IV. which Sir Thomas Murray in his collection calls the 78th act of his 6th parliament, must in all reasonable construction be still thought to be in force; for his commission from King Charles II. which is printed before the acts, extends only to the collecting and printing of such as were so.

The allowing of all the great barons to come to parliament, or at least the granting them more representatives, is highly reasonable, because, since the bishops, abbots, and priors, who made up the third Estate before the reformation, are now justly laid aside, our parliaments are not so numerous, and by consequence their weight and authority not so great as formerly. That the bringing in of more barons, instead of those clergymen, is certainly much more for the interest of the country, than to supply their places by protestant bishops, will evidently appear by the following argument.

Those popish clergymen had not such an absolute dependence upon the King as the protestant bishops, but owned the Pope, and the conclave of Rome, as their more direct and natural superiors; and the abbots depended entirely upon the choice of the monks, and therefore were not so apt to be

at the devotion of the court as our protestant bishops, who immediately depended on the King, and no other person, for their preferments. This is evident from the Roman clergy's having many times espoused the quarrel of the church of Rome, against that of their Princes, in most nations of Europe; and the danger of that in Scotland was well enough perceived by our ancestors, which occasioned those frequent laws we find in our statute books against clergymen going out of the country to purchase benefices at Rome, &c.

Sir Thomas Craig, in his book *de Feudis*, Edinburgh edit. in folio, page 90, says, That our archbishops, bishops, and abbots, were all elective dignities; the archbishops were chosen by the bishops, and the bishops by their chapter, with the consent of the nobility of the country; and the abbots and priors were chosen by their own convents. But the Pope, the King of France, and King of Scots, falling afterwards into an ambitious contention about naming the persons to those prelacies, the elections which before that time were altogether free, were intrenched upon, and the chapter or convent named three, of whom the King chose one, and the Pope confirmed him, as appears by the pragmatical sanction, and some of our statutes: but in process of time both the election and nomination fell to the King, and the chapter only made choice for form's-sake. By our acts of parliament, this appears to have been in the time of James V.

Yet, by their authority in parliament, and otherwise, they had so much influence, that there are

two remarkable instances of their having endangered the ruin of the nation, rather than they would part with any of their benefices, or quit a rag of their superstition. The first was, when for fear of their religion they hindered an interview betwixt our King James V. and his uncle King Henry VIII. of England, and by consequence the union of the nations upon more honourable terms than any that we have had offered since, which occasioned our disgraceful overthrow at Solan Moss; the grief of which killed that unhappy and misled Prince.— The second was their breach of the contract of marriage betwixt our Queen Mary and the Prince of Wales, afterward King Edward VI. which occasioned our shameful defeat at the battle of Musselburgh, and exposed the country to the devastations of the English, as their matching her to the Dauphin did afterwards expose us to the tyranny of France.

King James the 6th, who was a cunning Prince, and fond of prerogative to the highest degree, soon perceived, that if he could bring protestant bishops into the church of Scotland, who should have an entire dependence upon the crown, they might be as useful to support that towering monarchy which he had in view, as the popish bishops had formerly been to support the papacy, in which the event shewed he was not mistaken.

Another thing proposed to the consideration of the parliament, is, Whether or not they may think it proper to re-assume their old privilege of chusing

their speaker. This was their ancient right, as appears by the act of James I. cap. 112. formerly mentioned. Nor do we find that they were deprived of it by any law till the time of King Charles II. when this power was conferred on him by the first act of his first parliament. How much this hath been since improved, to lessen the privileges of parliament, is well enough known.

It may also deserve their consideration, Whether they ought not to exclude the officers of state from voting in parliament, as such. The King of Scotland is none of the Estates, though formerly he used to preside in parliament; and therefore there seems to be no reason that his ministers should have any vote there as such, for this can no way consist with our old constitution, as appears by the 47th chapter of the statutes of David the 2d, the title of which is, *Soli Consiliarii Electi debent Interesse Concilio Regis*, where it is ordained, that no person of quality, eminence, or degree soever, bring any other person with himself into the King's council, as a counsellor or assessor, except those who are chosen by the council and the Estates; and the like is confirmed by the statute of Robert II. cap. 1. This practice seems also directly to thwart the act of James VI. parl. 11. cap. 40. which obliges the King to do nothing directly or indirectly in prejudice of free voting and reasoning, since it is evident that the voting of his ministers must certainly have an influence upon the votes of others, who have any dependence upon the court, or expectation from it.

The privilege of creating Lords of parliament and royal burghs, relates also to the constitution of parliament, and therefore deserves the consideration of the Estates in the next act of settlement. Anciently, peers were created in parliament: thus we find many earls and barons created in the parliament at Forfar, by King Malcolm, ann. 1061, and amongst them the Lord Douglas.* We find likewise that Kenneth III. obtained the consent of the three Estates when he conferred the title of Prince of Cumberland upon his son, ann. 900, and Robert III. in a parliament at Perth, ann. 1396, created his own son Prince David, Duke of Albany. And indeed it is but reasonable that they who are made Lords of Parliament, and by that means entituled to a power of legislation, should be admitted with the consent of parliament; of which ancient privilege we have nothing left now but the shadow, which is the reading and recording the patents in parliament.

This will appear to deserve the consideration of our Estates so much the more, if they consider what Sir Tho. Craig says of the original of the Lords of parliament in his book *de Feudis*, p. 79. “The name of Lords and their dignity in the government, says he, arose thus: In the beginning they were only barons, and are no more still; but the name came from hence, all barons were obliged to give their presence in parliament; but when they were all there, it being impossible to collect

* History of the House of Douglas, p. 15.

“ their suffrages, because of their multitude, one
 “ or two was chosen from every province, to treat
 “ with the King about the affairs of the kingdom.
 “ At first those of the greatest dignity and experi-
 “ ence in affairs were delegated, and called by the
 “ name of Lords ;* but after ages growing more
 “ degenerate, and parliaments becoming more fre-
 “ quent, because most controversies were decid-
 “ ed in them, the lesser barons were not able to
 “ bear the charge of attending : and hence it came
 “ to pass, that those who had most riches were de-
 “ legated instead of those who had most experience,
 “ and so those richer barons retained that dignity
 “ during their life. And as mankind is always
 “ prone to flattery, they retained the name when
 “ the parliament was up, and their heirs being
 “ possessed of the same estates, were unwilling
 “ to part with the name. And thus it came to
 “ pass, in progress of time, that those who at first
 “ were only commissioners from the barons, were
 “ taken into the number of the Lords of parlia-
 “ ment, as often as parliaments were summoned.”

By this, it would seem, that though the titles
 of Duke, Marquis, Earl, Viscount, and Lord, ad-
 vanced those that had them to higher degress of
 honour, yet it gave them no authority to sit in
 parliament, but as they were barons ; so that it was
 an intrenchment upon the liberty of the barons,
 since they did not all come to parliament in per-

* In the old acts, all members of parliament were called Lords of
 Parliament.

son, that any baron should sit there by virtue of a patent of nobility, without a commission from the other barons. But since this abuse is of so long a standing, and that there are so many great men concerned in it as would make it of dangerous consequence to redress it, perhaps it may deserve the consideration of our parliament, whether this should not be one of the preliminaries for the next successor, that no patent of nobility shall henceforward carry an hereditary right to sit in parliament, without the consent of the Estates.— This would raise the dignity of our present nobility, which is so much diminished every day by the addition of new families, and be a sufficient guard against the designs of succeeding Princes to make a balance in the house on the court-side, against the interest of the country.

Then as to royal boroughs, which have a power of sending members to parliament, there is no reason to doubt but they were at first dignified with that privilege by the consent of parliament, tho' we do not find it expressly mentioned in our printed acts. The other privileges of several of them, and the manner of their government, we find from time to time ratified and regulated in parliament; particularly as to the choosing of their councils and magistrates, as may be seen in the acts of James II. parl. 11. cap. 46. James III. parl. 5. cap. 30. where, for the more security and freedom of the boroughs, it is enacted, that no constable or captain of any castle may bear office in the town. Parl. 14. cap. 108. that the election of officers be without partiali-

ty or mastership : and James IV. parl. 6. cap. 80. James V. parl. 4. cap. 26. ; and James VI. parl. 20. cap. 8. That all their officers be traders and dwellers within the borough : and James III. parl. 14. cap. 111. : and James VI. parl. 5. cap. 64. and parl. 7. cap. 119. the royal boroughs are allowed a yearly convention for matters concerning their state, and the welfare of their common trade ; which is a confirmation of their ancient *curia*, or *parliamentum quatuor burgorum*, the first institution of which we know not, but find it mentioned in the parliament of David II. anno 1368. ; but the old laws, called *Leges Burgorum*, were enacted in the reign of David I. And if the King could not grant those lesser privileges, without the consent of the three Estates, it is very improbable that he could give them this, which is the highest privilege of all, and a part of the sovereignty itself, without their consent.— Though there be no mention of this found in our printed acts, as to our old boroughs, yet it appears plain enough from parl. 15. James VI. cap. 263. where it is ordained, “ That three boroughs be
“ built in the Highlands, viz. one in Kyntire, ano-
“ ther in Lochaber, and a third in the Lewis, to
“ which our Sovereign Lord and the Estates fore-
“ said, shall grant, and by these presents grants, all
“ privileges which his highness or his predecessors
“ have granted to any other boroughs within this
“ realm. And that it shall be lawful to our Sove-
“ reign Lord, by the advice of the Lords of his Majes-
“ ty’s Exchequer, to grant to every one of the said
“ boroughs so much land and ground from his annex-

“ ed property, as may serve to build the same upon,
 “ with as much land and fishing next adjacent, as
 “ may sustain the common charges of these bo-
 “ roughs.”

This is sufficient to explain the method how our royal boroughs were erected, and came by their privileges ; and there is another act which helps still to make it clearer, viz. parl. 11. James VI. cap. 112. which enacts that no borough may sell their freedom in whole or in part, without consent of parliament. The reason of which is plain, because they had that freedom by their consent, and therefore no less authority was necessary to destroy than there was to create : And by an act of King James II. parl. 11. cap. 45. it is enacted, that no regalities be granted without consent of parliament ; which may serve to put this matter beyond all doubt.

To this may be added, that it seems highly necessary for the parliament to take into their consideration, whether it may not be fit, in the next act of settlement, to deprive little insignificant burghs of their privilege of sending members to parliament, and to confer the same upon several considerable towns which have it not. This were a ready way to have the nation more fully and truly represented in parliament, and likewise to prevent bribery in elections, or taking off of members from the interest of their country, when elected, by bribes, pensions, &c. For substantial and rich towns are under no temptation to take bribes, or to elect insignificant and needy men, who are neither capable of

serving their country in parliament, nor proof against bribes, to make them espouse an interest contrary to that of the nation. This will appear to be the more reasonable, because, by the 11th act of the 11th parliament of King James VI. it is statute and ordained, that the taxation of the free boroughs shall noways be altered, but stand as the same stood in all times preceding; that is to say, their part of all general taxations in time to come, shall extend to the 6th part thereof only. This shews it to be altogether unreasonable, that they who bear but a 6th part of the public charge, should have any more than a 6th part of the representation in parliament; otherwise they may impose upon the nation, as they have, for the most part, done, of late, in making such laws as are against the inclinations of those who bear the other five parts.

It would seem also to deserve the consideration of our parliament, whether it were not fit to make a law, that no Lord should be capable of being admitted, nor no Commoner capable of being elected a member of parliament, without a previous examination by a committee of parliament appointed to attend elections, as to his abilities, and particularly as to his knowledge of our constitution. This would oblige all men of note to read our statutes, law-books, and histories, and the best treatises about government, and the interest of nations, carefully; and having once imbibed true notions of our own constitution, and just ideas of government in general, they would not be

so easily brought to comply with arbitrary Princes, as too many have been of late, because of their ignorance.

V. The 5th thing proposed to the consideration of our parliament is, whether it may not be proper for them, in the next act of settlement, to secure to themselves their ancient share in the *Jura Majestatis*, and administration formerly mentioned.

The Power of the Scots Parliaments formerly, in Peace and War.

1. That there be no war or peace made without their consent. Our historian, Buchanan, informs us, that King Robert the Second, at the solicitation of France, agreed to a truce with England, but in vain, because it was not in his power to make peace or truce without consent of parliament. He gives us likewise an older instance of Malcolm the Fourth, who, by act of parliament, was obliged to make war upon England, because King Henry II. had fraudulently deprived him of the northern counties. And when this pusillanimous Prince agreed voluntarily to part with Northumberland, the Estates would not allow it, but told him, he could do no such thing without their consent. In like manner they obliged Baliol to denounce war against King Edward I. of England, for having deceitfully prevailed with him to own him as his Superior; which they determined to be void, because the King of Scots could do nothing which related to the state of the kingdom,

without the consent, or against the mind of the three Estates.

In King Robert the Second's time, when the English had invaded our borders, under confidence of a truce, the King was for passing it by, and observing the truce; yet, the nobility, not only without his consent, but directly against his will, revenged themselves by an invasion upon England; so far were our Princes in those days from having peace and war at their own disposal. King James the Third, one of the most arbitrary Princes that ever we had, when Henry the Sixth of England solicited him for a perpetual league, or a durable peace, frankly owned that he could do no such thing, because it was forbidden by an ancient law. In the minority of King James the Fifth, the Duke of Albany, his Viceroy, being bred in France, and totally addicted to the interest of that Court, he endeavoured, at their solicitation, to engage us in a war with England. The nobility hearing the English were also making great preparations, agreed in parliament to raise an army for defence of their country, according to their ancient constitution, and marched with them to the borders; but, perceiving that the main design of the government was to give the English a diversion in favour of the French, and that the Earl of Shrewsbury, the great English General, kept only upon the defensive, and did not invade us, they would by no means invade England: But the Earl of Arran, says Bishop Lessly, and the rest of the nobility, told the Governor plainly, that they were there to defend

their country according to law, but would not invade England till he shewed them the causes why. Thus the Viceroy was obliged to forbear, though he was a Prince of greater prudence and conduct than most of the Kings of his family that had gone before him, and had the full exercise of the royal authority. These are a few of the many instances of this sort that are to be found in our history; but it will appear more incontrovertibly plain from the following acts of parliament.

In the acts of King James the Third, cap. 100. they order all the subjects to be ready armed, with twenty days' provisions, upon eight days warning, to attend the King: they appoint the length of their spears, the length of their jacks, the fashion of their targets, and that every Lord and Baron, for they were then the commanders, should be answerable for their men's observing good discipline; they gave order for repairing and furnishing the castles belonging to the King, or any of the subjects. They debate and consider of the justice of the war against Edward IV. King of England, express the causes of it in the act, and take notice, "That the King was altogether for peace, so that it had been according to the honour and worship of his highness and the realm, be the sight of his said three Estates. They add, "The three Estates forsaide, hes thairfor hartfully of
 "thair awin free will, grantit and promittit to our
 "Soverane Lord, to remane and abide at the command of his highness with thair persounis, and thair
 "substance of landis and gudis, in defence of his

“maist nobil persoun, his succession, realme and
 “lieges, as *they and their forbearis hes of auld times*
 “*done of befoir.*”

By this it is plain, that the proposals of peace made by the King were laid before the parliament, and submitted to their judgment, and that his Majesty could not engage them in a war without their own consent; they knew no such prerogative belonging to the Crown; and therefore the rule of their attending him in the war, was the practice of their ancestors.

The power of the Estates in matters of war, is further evident from the other Articles of this act, wherein they order rendezvouses of the people every 15 days, appoint guards on the sea-coasts, at every six miles distance, that if the enemy invade by his wardens, the King should resist by his wardens; but, if the King of England invaded in person, the King should resist him in person: so that here he was appointed Dux Belli by the authority of the Estates. Their power in military matters was of universal extent, from the highest act of it, in appointing the commanders, to the very lowest of it, which was appointing the couriers, and ordering the Treasury to pay them for their intelligence.—Therefore we are not to wonder, that in the same act we find the Estates order proclamations to be issued out against traitors, and appoint garrisons, with the number of men that should maintain them, the officers that should command them, and the pay that both officers and soldiers were to have.

In the Reign of Queen Mary, it was one of the Articles agreed on betwixt the Deputies of the Court, and those of the nobility, that the King and Queen neither make peace nor war on their parts, but by the counsel, judgment, and consent of the Estates, according to the ordinance of the country, and as was observed by their predecessors;* which was a fair acknowledgment of the power our Estates had anciently in that matter.

The Estates having so great a power in affairs of war and peace, it followed naturally that they should have a right to take order about arming the people, and training them up in the use of those arms. So much of the sovereignty being then lodged in the three Estates, they apprehended no danger of rebellion from the people, because they themselves were only the quintessence, or refined part of them met in parliament, and could have no distinct interest from that of the people, whom it was their advantage to cherish and encourage:—The barons and freeholders could not otherwise maintain their own grandeur and riches, but by having substantial and wealthy tenants; and the boroughs could not expect that their corporations should flourish either in commerce or good discipline, if the burghers and other inhabitants were not encouraged by a mild and good government. This being the case, and the interest of the government and people one and the same, the parliament from time to time appointed all of them that were

* Knox and Spotswood's Histories.

capable of bearing arms, to be armed and disciplined, settled the days for their rendezvouses, ordered butts to be erected in every parish, that the youth might on holidays be encouraged to improve themselves in archery ; and enacted, that the sheriffs and barons, and magistrates of boroughs should take care to see this performed, and levy penalties upon those that neglected or transgressed those statutes. Thus, in the acts of William the First, cap. 23. it is enacted, that every man shall be armed for the defence of the kingdom, according to his ability ; and the arms are there specified, and musters appointed by the sheriffs and barons every Easter.

In the acts of Robert the First, cap. 27. the like is enacted. In the acts of James the First, cap. 20. it is ordained, that every man busk them to be archers from twelve years of age ; and that in every ten pounds worth of land there be made bow-marks, especially near parish-churches, where every man should at least shoot three times in his turn ; and the proprietor of the land, or sheriff, was to raise a fine from every man that did not come to the said archery. Cap. 48. it is ordered, that there be four rendezvouses in each county per ann.

In the acts of James the Second, cap. 71. it is ordained, that the Lords and Barons, spiritual and temporal, hold rendezvouses of the people four times per ann. ; that the people use archery each Sunday ; that every man shoot six times at least, and have money allowed him to drink ; that there

be four or five pair of butts in each large parish, and that all men from twelve to fifty use shooting.

In the acts of James the Third, cap. 106. it is ordained, that the sheriffs hold rendezvouses of the subjects, according to the act, and give the King an account, under his own Seal, and that of four barons of the shire, of all the men able to carry arms in the said shire, and of their being armed according to the act.

In the acts of King James the Fourth, cap. 53. rendezvouses are appointed four times per ann. in like manner, that all men from sixteen to sixty be sufficiently armed, and that the sheriffs and magistrates of burghs take care to see this act put in execution.

In the acts of King James the Fifth, cap. 55. rendezvouses are appointed twice per ann. and that all the people be armed according to their degree and ability. And cap. 59. it is statute, that every Earl, Lord, Baron, and Laird, give the names of the persons that come with them to the said rendezvouzes, and the manner of their armour, to the sheriff, &c.

In the acts of King James the Fifth, cap. 61. it is enacted, that, in order to discipline the people through all the kingdom, every sheriff, steward, baillie, provost, alderman, and baillies of boroughs, lords and baillies of regalities, at every weaponshawing, concur with the King's commissioners that shall happen to be deputed to them, and they together to consult with the most able persons of the shire; and after they have enrolled the names of every man, with their harness and weapons,

choose one able man or more for every parish, who shall be captains to the companies of the said parishes, to teach them the use of their arms; and shall assemble their companies at least twice per month, during May, June, and July, and the like in all other months, if they find it convenient; and the said captain to be chosen, as oft as shall be seen expedient, by the sheriff of the shire, and the commissioners and council joined with him.

Thus we find that our people were universally and continually trained up in the use of arms, that every man was obliged to be armed according to his quality; and that the command of those armed men was not entrusted with every man that could get a commission from the King, but either with such as were chosen by the people themselves, as in the above-mentioned act, or with the Lords and Barons that were their landlords and masters, and by consequence obliged in honour and interest to treat them civilly; and being so much concerned in the welfare of the kingdom themselves, were not so liable to be bribed or bought over to espouse the interest of the Court against that of the country, as mercenary troops and standing armies have ever been.

The first attempt of introducing mercenary troops among us, we find to have been made during the regency of Mary of Guise, dowager to King James the Fifth; and this she was put upon by her French council, and such slavish mean spirited people of our own country as fell in with them.— They offered also to impose a tax for maintaining

those mercenary troops, and would then have completed our slavery under that French administration, had not 300 barons, being equally offended with this tyrannical project, and the sluggish temper of the nobility, who, by their silence, betrayed the public liberty, met at Edinburgh of their own accord, and sent two of their number to the Queen Regent, with a noble remonstrance, signifying that their ancestors had not only defended their country against the English, when much more powerful than they were then, but had also frequently invaded England; and that they were not so much degenerated, but they were still willing to hazard their lives and estates in defence of their country; that it was a thing of most dangerous consequence, to trust the safety of the nation to mercenary soldiers, men of no substance or expectation, and therefore liable to be tempted to do any thing for money; men, whose insatiable avarice is ready to be inflamed by every new opportunity, and who have no other standard of their fidelity but variable fortune: but supposing it to be otherwise, and that they are more actuated by love to their country, than by any respect to their own private condition, is it credible, that mercenary soldiers will fight with more courage for other men's estates, than the proprietors themselves will do for their own; and that a little inconsiderable pay, which is to last no longer than till the war is at an end, is more capable of inspiring vulgar fellows with courage, than the consideration of fighting for estates, wives, children, honour, and religion, is ca-

pable of animating our nobility and gentry ? They added, besides, that the measures proposed, related to the essential part of the government, and was a thing of too great consequence to be treated of at that time, and during the nonage of their Prince ; and they concluded, like men of wisdom and foresight, that this making use of mercenary troops, would introduce luxury, and want of military discipline and experience among the rest of the people, make both their bodies and minds unfit for war, and expose the whole kingdom to danger.— This remonstrance, and the fear which the Regent had of the resentments of such a body of gentlemen, obliged her to lay aside the project, and to acknowledge her error.

There happened soon after this, another remarkable instance of our nobility and gentry's asserting their power in matters of war, which was thus. In the year 1557, the Regent assembled the nobility at Newbattle, and pressed them to declare war against England, both upon the account of the injuries they themselves had received, and of their league with France ; but they could not be prevailed upon to be the first aggressors. At last being provoked by new injuries from the English, thew were brought to denounce war : But Monsieur d' Osel, the King of France's Lieutenant-General, and commander of his auxiliaries in Scotland, having, by the advice of the Queen Regent and her faction, presumed to carry the great guns over Tweed, to attack Wark Castle, before any such thing was agreed upon by the nobility and

gentry, who were then in camp, they resented it highly ; and the Duke of Chastelherault being at their head, they told the Regent and her faction, that this was a greater power than ever any of their Kings had laid claim to, and therefore they called a council, wherein they ordered Monsieur d' Osel to bring back the great guns on pain of treason ; at which the Queen Regent and he were both extremely offended—but there was no remedy ; they were forced to submit, though her Majesty complained that it was a violation of her authority as Regent, and Monsieur complained that it was a diminution of his master the King of France's honour, whom he represented. This story is to be found at large in Lessly and Buchanan.

They that do not understand our constitution, are ready to think that this and other passages of the like nature, as the hanging of King James III.'s minions over Lauder Bridge, were only the results of military fury, and irregular tumults : but they are mistaken ; for in those days we had parliaments in the camp, and some of their acts are mentioned among our statutes, particularly that at Twesil-haugh, in Northumberland, in the reign of King James IV. and upon this was the complaint of our nobility grounded, that the Regent and her French champion should have offered to manage any thing relating to the war without their consent, since they were upon the spot, which none of their Kings had ever attempted to do in such a manner as she and d'Osel had done. This notion of a camp-par-

liament I know will sound but oddly amongst some of our young sparks, asserters of prerogative; but they will find that of King James IV. above-mentioned, to be the last of his printed acts; and that they may understand how it was practicable, they must consider, that the lords, barons, and freeholders, the constituent members of our parliament, were obliged by the constitution to attend the King's standard for such a limited time, in defence of the country: and we have no reason to doubt, but commissioners from the burghs did the like; for we find, by the acts of James IV. cap. 120. and Queen Mary, cap. 18. that no war was to be proclaimed, or tax levied, without the consent of deputies from the burghs, as the third estate of parliament; and it is certain, that they either sent some of their own magistrates, or other officers, to command the men whom they furnished upon such occasions. Nay, so far were our Princes from having a power to raise men at pleasure, or to keep standing armies on foot, that they could not so much as appoint themselves standing guards without authority of parliament; and thus we find the first standing guard that ever any of them had, was forty gentlemen appointed by the three Estates to attend King James VI. for which their allowance was settled by parliament—James VI. parl. 8. cap. 137.

As to naval force, our kingdom never abounded in that, because our war being chiefly with England, we could manage that by land; yet such

naval force as at any time we had occasion for, was likewise subject to the determination of parliament. This appears by the acts of James I. cap. 140. where it is ordained, that all barons and lords having lands and lordships near the sea, on the west and north parts, have galleys, under a certain penalty; and the way how these galleys should be maintained is there also determined, viz. by the proprietors of the lands upon the coast within six miles of the sea. And in the acts of Queen Mary, we find that the parliament revoked letters of mark, last parl. Queen Mary, cap. 23. And in the acts of King James VI. parl. 12. cap. 157. the King and three Estates revoke a commission which had been granted to the admiral, with unusual clauses.

In like manner as to castles, even those which were called the King's; they were not absolutely at the disposal of our Princes, but the parliament from time to time gave such orders about them, as they thought most conducive to the welfare of the kingdom. Thus we find in the acts of James IV. cap. 16. the governor of the castle of Edinburgh, appointed by the Estates; that they ordered the castle of Dunbar to be demolished; and the castle of Roxburgh was also demolished by the like authority.

And in the articles betwixt the deputies of the court, and those of the Estates in Queen Mary's time, it was agreed the castle of Dunbar should be demolished if the Estates thought fit; and that in time to come the King and Queen should make

no more new forts in the realm, nor enlarge them that are made, or repair them that are demolished, without the consent and advice of the Estates.*

And in the acts of King James VI. parl. 9. cap. 8. the parliament assigns money and provisions for keeping the castles of Edinburgh, Dumbarton, Stirling, and Blackness, to the behoof of his Majesty, and the welfare of the realm. And if the said money and provisions be otherwise disposed of, such disposition to be void and null.

And as our Kings had not the sole power of making peace and war, neither were they the sole judges of controversies about military affairs, as appears by the acts of King James II. cap. 62. where any debate that might happen betwixt parties, about persons that should be taken prisoners of war, is referred from the King to the barons, to whom it belonged, because of their experience. In like manner as to those feuds which did formerly so much abound among our nobility and gentry, the parliament enabled the King, from time to time, to take them away, by calling the chiefs before him and his council, and appointing him to be arbitrator of the differences, &c.—Act James IV. cap. 20. and James VI. parl. 16. cap. 22. and parl. 20. cap. 7.

* Knox and Spotswood's Histories.

The power of the Estates in raising and appropriating the Public Money, and calling for the Accounts.

There is a second thing reckoned among the *jura majestatis*, which is, raising of money. In this our parliaments have hitherto maintained and preserved their authority, more than in any other branch of the sovereignty ; yet, it will appear by the following instances, that our parliaments formerly exercised a greater power in ordering and disposing of the money which they granted for any public use, than they have been accustomed to do since the union of the crowns.

The first instance is, that in the acts of King James the First, cap. 146. when the Estates having granted a tax of 12d. per pound, for suppressing a rebellion in the north, they appointed four persons to be auditors of the accounts, and receivers of the money ; that they should keep it in a chest with four keys, of which each of them were to have one : they order that the said chest should be kept in the castle of St. Andrew's ; and in case a peace were made in the meantime, they ordered the money should be kept for common profit and use : so that clauses of appropriation, appointing public accountants, and inspecting into their accounts, is no new thing in the kingdom of Scotland.

The second instance is found in the acts of King James the Fourth, cap. 21. where the Estates having granted a tax for an embassy about the King's marriage, his majesty had been prevailed

upon to give a discharge of part of it: which the parliament took so ill, that they declared he could not do it, and that his discharge was void, and of no force or effect, because the said tax had been granted by the Estates for the cause aforesaid. And cap. 72. they order again that no discharge given for any part of it by the King, shall be of any force or effect, because the said tax was granted by the Estates for his marriage, and for no other use.

The power of the Estates to name and commission Ambassadors, about the Marriage of our Princes, Trade, War, &c.

3. There is a third thing reckoned among the *jura majestatis*, which our parliaments had a large share in, and that is, the naming of ambassadors, giving them instructions, adjusting their number and retinue, and regulating their expences when sent to make leagues and treaties about the affairs of peace and war, the marriages of our princes, and matters relating to trade and commerce; as is evident from the following statutes:

In the acts of James II. cap. 51. it is ordained that an embassy be sent to the Pope, to purchase certain privileges for the common good of the realm; and their expences and instructions are referred to the King's secret council. Cap. 61. they approve of the sending an embassy to France, and of the letters and instructions given to them.

In the acts of James III. cap. 62. they order the

sending of an honourable embassy to England for obtaining redress for breach of truce, and concerting measures for entertaining amity and peace in time to come. In the same act they ordain, that the King send a commission to his father-in-law the King of Denmark, to make an alliance with the Emperor. Cap. 90. they ordain an embassy to the Duke of Burgundy, to confirm and renew the alliance formerly made with him, to get a confirmation of the privileges granted to the merchants, and greater, if possible; and to obtain a reparation of damages: and the expences of this embassy were to be born by the whole burghs. Cap. 97. an embassy is ordered to England, concerning the marriage of the King's sister. Cap. 100. they ordain that an honourable embassy be sent to France from the King, and the three Estates, to the King of France, for a supply against the common enemy of England. Cap. 108. they ordered an embassy to England about a truce, the marriage of the Queen's sister, and the fishery of the river Esk, with instructions; and adjusted the number and expences of the ambassadors. Cap. 111. they appoint an embassy to the Pope, and adjust the instructions. Cap. 126. They order an embassy to the King of the Romans about a letter of mark; appoint the number of the ambassadors, and their charge to be born by the merchants.

In the acts of James IV. cap. 2. they named the ambassadors sent to France, Brittany, and Spain, about the King's marriage, adjusted their retinue and expences, and gave them their instructions

about renewing the ancient league with France. Cap. 22. they commit their power to the secret council, to give instructions to the ambassadors for renewing and confirming the alliances with France, Denmark, and Spain. Cap. 23. they appoint an embassy to Denmark, settle their number and expences, and give them instructions. Cap. 44. they give instructions for renewing the alliance with France. Cap. 45. and 46. they give orders again concerning an embassy about the King's marriage, and an embassy to Denmark. Cap. 72. they name the ambassadors to go to France, or any other realm, to treat of a marriage for the King, as it should be thought expedient by him, with the advice of his three Estates.

In the acts of Queen Mary, we find that the three Estates sent an embassy into France about her marriage with the Dauphin; that they appointed the terms of said marriage, and adjusted the privileges to be granted to the ambassadors.

This power of the parliament, in the marriage of our Princes, is further evident from that remarkable passage in our history concerning the settlement of the succession in the time of King Robert Bruce, viz. that if the male issue of himself and his brother failed, the crown was to descend upon his daughter, but the nobility should chuse her a husband, such as they thought worthy of her royal bed, and fit to succeed to the crown; because it was much more equitable that they should chuse a husband for her, than that she should chuse a King for them. *Buchan. in Vita Rob. Brussii.*

In the acts of James VI. parl. 15. cap. 277. we find that the parliament, considering how expedient it was that his Majesty, for sundry weighty affairs, tending to the advancement of his honour and estate, and the benefit of the whole subjects, should send ambassadors to several foreign Princes, and granted a tax for that end.

The Power of the States in Matters of Coinage.

4. Coinage is another thing reckoned among the *jura majestatis*, and in this our parliaments have from time to time exercised a very large power. In the acts of David II. cap. 46. there is an act for coining new money, because of the present scarcity of silver; wherein the three Estates of parliament, called there *Tres Communitates*, order the standard, and the allowance to the King and the officers of the mint.

In the acts of James I. cap. 25. the parliament determine and ordain, that our Lord the King cause mend his money, and strike it in like weight and fineness to the money of England.

In the acts of James II. cap. 33. intituled, *The advisement of the Deputies of the three Estates touching the matter of money*, they gave order as to the weight, fineness, and impression of the money, which they enact to be coined, and at what price the English and French money shall have course. Cap. 64. of that King's acts, they appoint at what rate foreign gold and silver shall be current, and particularly fix the value of French and German coin.

In the acts of James III. cap. 12. the States give order about coining copper money, and the value of English money. Cap. 22. they raise the value of the money, because being at a lower rate than in other nations, it occasioned the exporting great quantities of our money. Cap. 29. they order the money to have universal course as before the first proclamation made in parliament in the month of October, because of the great murmur occasioned by the diversities of payment within the realm; and that the penny-worths, i. e. the value of goods, were raised with the penny or coin, and thereby became dearer than usual. Cap. 80. they order the laws to be put duly in execution for bringing in of bullion, and preventing the exportation of money out of the country. Cap. 83. they raise the value of gold coin, to prevent its being exported. Cap. 89. they take notice of abuses in the coinage contrary to the acts of the last parliament, and order the same to be put in execution, and the like abuses to be prevented for the time to come. Cap. 108. they order money to be coined, appoint the fineness, weight, and value, and what profit the King shall have of the coinage.

In the acts of King James IV. cap. 10. it is ordered that pieces of gold and silver be coined equal in value and fineness to the rose noble of England, and to the old English groats. At the same time, they name the essay-masters, and give orders about the bringing home of bullion. Cap. 34. we find orders given about coinage, and the price of plate brought to the mint. Cap. 61. and 71. they give

orders about receiving cracked money. Cap. 88. they give orders about money and bullion, and that the laws on that head be put in execution. Cap. 133. they order again that cracked and flawed money have course in the realm.

In the acts of King James V. it is ordered that the crown of the sun shall have free course in the kingdom. Cap. 89. they make an act against exporting of money out of the kingdom. Cap. 106. they make an act against counterfeiting the King's coin.

In the acts of Queen Mary, parl. 9. cap. 69. we find a prohibition against carrying gold and silver out of the realm; and cap. 70. they make an act against false coin, or the bringing in foreign false coin into the realm.

In the acts of James VI. parl. 1. cap. 17. they order money to be coined equal in fineness to that of other kingdoms, and that no allayed money have course without consent of parliament. Cap. 19. they order all false money to be clipped. Parl. 7. cap. 106. they lower the price of gold and silver, and give order about foreign coin and bullion; and parl. 16. cap. 8. they make an act about coin and bullion.

The Power of the States in granting and limiting Pardons, and in punishing Rebels.

5. The power of giving pardons is another of the *jura majestatis*, wherein our Kings were far

from having an absolute and unlimited power, as will appear by what follows :

In the 4th book of *Regiam Majestatem*, cap. 17. No. 3. and 4. the King is not to pardon manslaughter without the advice and consent of the deceased's relations, otherwise the said relations may avenge themselves upon the manslayer. The like is to be seen in the *Iter Justitiarum*, agreed on in parliament in the time of King William I.

In the acts of David II. cap. 44. it is statute, that remissions granted, or to be granted, by the King, for any crime, shall be void and null, except the injured party have satisfaction made within a year after the date. Cap. 50. it is statute that no pardon be given for wilful murder, without the consent of parliament, and that they think the pardon expedient for the common-wealth. It is likewise there statute, that no pardon be given for manslaughter, till enquiry be first made in the place where the slaughter was committed, by unsuspected persons.

In the acts of James I. cap. 50. we find it was not customary for our Kings to grant pardons, but on condition that the party endamaged should have compensation: and it is enacted, that the highlanders should make compensation for robbery, &c. in the lowlands, at the arbitration of honest men sworn for that end.

In the acts of James II. cap. 83. it is enacted that those who have the King's remission, find surety to satisfy the parties that complain within forty days, on pain of being imprisoned during the

said forty days, and that the remission be of no force. For actions committed in time past, the complainer to have recourse to the Lords of the Session, who shall have power to order restitution, according to the act of spoliation; and if the party be not content, the remission to expire and be of no force.

In the acts of James III. cap. 10. we find that whoever carried or sent any money out of the realm, should pay the like sum, and 10% over and above, which should be unremittable, i. e. the King should have no power to pardon it. Cap. 88. it is observed, that the King's readiness to grant remissions had occasioned frequent treasons, slaughters, robberies, and common thefts; and therefore the King promised to give no pardon or reprieve to any manner of slaughter, for three years, nor any pardon for common theft: and if he gave remissions for old actions, it was to be expressed, that the action was committed before he was 25 years of age, otherwise to be of no force. Cap. 110. they counsel the King, which is the same thing with making an act, that he should take care to have all notorious trespassers brought to trial without remission, and that he give no respite or reprieve in time to come, as being more against justice than plain remissions. Cap. 116. the King again owns the abounding of treason, murder, &c. because of the too common giving of pardons, and therefore promises to give none for seven years to come.

In the acts of James IV. cap. 96. it is enacted that the greatest crime be specified in remissions,

because of abuses there had been committed, in putting a slight cause instead of the special cause in remissions. Cap. 97. it is ordered, that no remission be given for premeditated murder. In the acts of this King, collected by Sir Thos. Murray, parl. 2. act 12. it is enacted, that no gifts, signatures, or remissions, be passed, but by advice of the privy council; and that all such letters be signed by the King, and six of the counsellors at least, otherwise to be null.

In the acts of James V. parl. 3. cap. 7. it is owned that no remission or respite is to be pleaded for slaughter and mutilation.

In the acts of James VI. parl. 8. cap. 136. it is owned that slaughters and other odious crimes have been frequently committed, because of the ready granting of respites and remissions; and therefore the King promises to give none for three years to come; and if any be given for old actions, it is to be expressed, that the trespass was committed before this present parliament, otherwise the remission to be void. Cap. 138. it is enacted, that whoever pleaded a remission or respite for slaughter committed in pursuit or defence of legal actions, the pleading of the same shall be the conviction of the pleader. Parl. 11. cap. 47. the King is precluded from giving a *supersedere* in cases of treason. Parl. 12. cap. 155. he promises to give no remissions for slaughter and other odious crimes for five years, and if he do, that they shall be void; and if granted for old actions, that it be expressed in the same, that the party had had compensation, other-

wise the remission to be void. Parl. 13. cap. 169. orders that remissions and respites shall not be granted without a letter of Slaines, testifying that the injured party is satisfied : and cap. 176. it is ordered, that no pardon be given for slaughter, &c. except the injured party be first satisfied, otherwise the remission or respite to be void.

To this head do properly belong the punishment of rebels, the terms on which they were again received into favour, and general pardons ; all which we find to have been adjusted by authority of parliament.

Thus, in the acts of James II. cap. 14. it is enacted, that such as rebel against the King's person and authority, shall be punished according to the quality of their rebellion, by the advice of the three Estates. Cap. 42. we find that the Earl of Douglas, Earl of Murray, and others, were forfeited in parliament. In the acts of King James IV. cap. 3. and 6. we find those who were in rebellion or arms against the King in the field of Stirling, pardoned and restored to their Estates in parliament. In the acts of James V. cap. 62. we find a general remission or pardon given in parliament. In the acts of Queen Mary, cap. 7. we find traitors to have been declared such by the three Estates in parliament. Cap. 15. the Earl of Angus, and others that had been forfeited and declared traitors, are restored again in parliament. In the first act of Queen Mary's parliament, held at Edinburgh, on the 4th of June, 1560, we find a general pardon, or act of oblivion. In the first parliament

of King James VI. cap. 4. we find the conditions upon which rebels were to be received into favour, appointed in parliament; and one of them was, that they should oppose the holy league, and the decrees of the council of Trent. Cap. 9. and following, those who took part with Queen Mary, against her son James VI. are declared to be rebels. Parl. 7. cap. 109. what the nobility and others did against them was declared to be well and lawfully done. Cap. 10. the Earl of Argyle, and others, are restored, upon their return to their obedience. And parl. 23. act 23. we find a general pardon for things done against penal statutes. Nay, even in the time of King Charles II. when all the noble structure of our freedom and liberty was overturned, we find so much deference paid to the authority of parliament, that, parl. 1. sess. 2. cap. 10. a general act of indemnity, with some few exceptions, was passed, with the advice and consent of the three Estates; and we never find a general pardon for treason but in parliament.

The Power of the Estates in appointing Judges and Courts of Judicature, and in censuring them.

6. Another of the *jura majestatis*, is the appointing courts of judicature, judges and other ministers of justice, and the methods of administering the same; in all which the Parliament of Scotland did always reserve to themselves a sovereign power. This appears by the acts of Malcolm II.

where the barons, that is, lords of Parliament, settled all the fees of the officers of justice and courts of judicature, and of the officers of the King's house, from cap. 1. to 9.

In the acts of William I. cap. 35. mention is made of the chamberlain air or court, which enquired into all transgressions of the law through the towns of the whole kingdom, and into the abuses committed by magistrates of cities, merchants, and tradesmen of all sorts ; which, by the account of it bound up with our old laws of *Regiam Majestatem*, seems to have been an excellent constitution. The institution of this court must however be much older ; for we find it mentioned in cap. 8. of Malcolm II's laws, where the fines of the same, as well as of those of the justice air, the sheriffs courts, burgh courts, baron courts, &c. are also settled. And any man who looks upon our laws, will find the justice airs, which are much the same with the circuit towns in England, appointed to be held from time to time, and the method of their proceeding regulated by those laws.

In the acts of James I. cap. 6. it is ordained, that officers and ministers of law be appointed throughout the realm, and that they be such as have a sufficiency of their own, by which they may be able to make satisfaction, if they transgress.—Cap. 72. the King and Parliament ordain, that the chancellor and certain discreet persons of the three Estates, be chosen and deputed by the King to sit three times per annum, for administering justice ; and in the following chapters, they appoint the

time of their meeting. Cap. 93. it is appointed that all whose who shall be chosen in any future parliament for hearing and determining causes, shall swear to determine the same faithfully, according to their knowledge, without favour or affection. Cap. 98. they appoint that an odd person be chosen in every arbitration for compromising differences: If it be among clergymen, by the bishop and his chapter; if among barons, or other laymen in the country, by the sheriff and barons; and if among burghers, by the provost and council of the town. From whence it is evident that there was an aristocracy interwoven throughout our whole constitution. Cap. 139. it is appointed, that advocates, before they be admitted to plead any cause, shall swear that they believe it to be just.—Cap. 150. the judges are chosen and sworn in the parliament held at Perth, January 10. 1434.

In the acts of James II. cap. 3. it is appointed, that two sessions be held yearly by the lord lieutenant and the King's chosen council. Cap. 68. it is ordained, that the session shall sit three times per ann. and the times when, and places where, are there appointed. The lords of the session being a committee of the three Estates, are there also named for each diet, and their power and manner of procedure is regulated in the following chapters.—As to their expences, the three Estates allowed them only the fines arising to the King in their own courts, thinking that they ought to bear their own charges, considering they were not to sit above forty days, and that it might not come to their

turn again once in seven years. So that here was a rotation of the juridical power amongst the nobility and gentry, without any charge to the country, which must needs oblige all men of note in the kingdom to study the laws and constitution, that they might be capable of administering justice with knowledge and applause, when it came to their turn. So that there was no room for bribery by the court to wrest law for serving a turn, as has been practised but too frequently since.

In the acts of this King, collected by Sir Tho. Murray, parl. 11. act 44. it is ordained, that his Majesty make no hereditary officers for administering justice, and that such as were so made should be revoked.

In the acts of James III. cap. 30. it is ordered that there be a session after the form of the session last held, and that the lords should be chosen to sit thereupon. Cap. 33. they appoint justice airs for ministration of justice. Cap. 76. they appoint justice airs twice per annum, and that the lord justice pass through the realm for that end.

In the acts of James IV. cap. 51. there is a law made to the same purpose, for the universal execution of justice; and if it be needful, that the King be present in person.

In the acts of James V. cap. 6. we have the institution of the college of justice, with the names of the lords, the time and place appointed for their sitting, and the manner of their proceedings regulated; and the King promises, that he will not, by private writing, charge or command, at the instance

of any person, desire the lords to do otherwise in any matter that shall come before them, but as justice requires : And cap. 63. this institution of the college of justice is approved. It was likewise ratified in the acts of Queen Mary, cap. 2. In the acts of King James VI. parl. 12. cap. 132. there is an act for regulating the jurisdiction, presentation, qualification, and age of the lords of the session, and annulling such presentations as his Majesty had made of any person under the age appointed.

And as our Kings could not of themselves appoint judges, neither could they give being to any new court or jurisdiction, without the consent of the three Estates, as appears by act, James VI. parl. 8. cap. 131. which discharges all jurisdictions and judgments not approved by parliament. And if the King commanded any thing contrary to law or reason, though under the Great Seal, Privy Seal, or Signet, to any sheriff, or other officer of the law, they were not to obey him, but to receive his command, writ upon the back of it, and return the same to him again ; as appears by the act of David II. book I. cap. 18. and by the parliament of Robert II. held in 1372.

We find likewise by the statute of Robert III. *de Vicecomite et aliis Ministris Regiis calumniandis*, cap. 34. that the justices in their eyres were to enquire into the behaviour of the sheriffs and others of the King's ministers, and if they found them guilty of any defect, were to remove them from their office till next parliament ; and such as were so removed were to lose the fee of their office for

that year, and the justices were to take security for his appearance in next parliament to abide their determination, and he was not to be restored without consent of parliament.

In like manner we find, that in parl. 6. James VI. cap. 92. notice is taken, that several private writings and charges had been directed to the lords of the session by the King and his Privy Council, sometimes to proceed in civil causes, sometimes to stay the process, and sometimes to stop the execution after decreets given; which, being contrary to the act of parliament, whereby the college of justice was instituted, it was enacted that the said lords should proceed in all civil causes depending before them, notwithstanding any private writing, charge or command, by any person or persons, to the contrary. Cap. 93. because of a heavy murmur among the subjects, that the King chooses young men without gravity, knowledge, and experience, and who have not sufficient estates, to be lords of the session; it is enacted that the King shall present men that fear God, of good learning, practice, judgment, and understanding of the laws, of good fame and sufficient estate, who shall first be sufficiently tried and examined by a number of the said lords; and if they find them not duly qualified, they are at liberty to reject them, and the King is to present another, until he be found so qualified.

The Power of the Estates in naming the Officers of State, and Privy Counsellors.

Another thing which may not improperly be reckoned among the *Jura Majestatis*, is the naming of the officers of the King's household, the officers of state, and privy counsellors; and this our parliaments had a power to do, as appears by the following acts. James III. cap. 48. they appoint Mr Richard Guthry to be principal confessor to the King, and General Almoner. In the acts of James IV. cap. 16. they appoint Patrick Lord Hales to be master of the household to the King, governor to the Duke of Rothsay, the King's brother, and of the castle of Edinburgh. Cap. 25. they appoint those who were to bring in the King's property and casualty, silver, &c. for the sustentation of his house. Cap. 27. the parliament orders the accounts to be taken of the King's officers, as treasurer, comptroller, &c. both those appointed in his father's time and in his own; and that auditors for taking the said accounts be chosen and named, and have their commission by the advice of the three Estates, and they were accordingly named in that act. Cap. 28. they name and appoint the members of the secret council, that are to be constant, and likewise such as were to be of the privy council, when they were present, or when the King sent for them; and those counsellors, so chosen, were sworn in presence of the King and the three Estates, to give him true and plain counsel in all matters that concerned his Majesty and the realm. They were appointed to continue of his council till the

time of the next parliament, and to be responsible and accusable to the King and the three Estates for their advice : and in that same act the King promises and grants, that he will abide and remain, that is, follow their counsel until the next parliament ; and that no infeftments, donations, conducts, remissions, &c. be granted, without their advice and consent, signed by the King, and so many of the said council as shall be present for the time, to the number of six at fewest, whereof the chancellor to be one : and all letters granted otherwise, to be of no force or effect, nor answered by the chancellor, privy seal, or secretary ; and the King was to be governed by their advice in disposing and giving his treasure, plate, chains, jewels, and other habiliments pertaining to his person. It is true that the naming and electing of this King's council in parliament was during his minority ; but as the act takes no notice of this exception, and that in the proposition of the debate of the field of Sterlin, they inveigh against the perverse council which misled his father, it is not to be doubted but they had a mind to prevent the like for the time to come, and therefore thought it their right to have a hand in naming and choosing such counsellors as were to be about his Majesty, whether he were of age or not. Thus in the reign of Queen Mary, one of the articles agreed upon betwixt the deputies from her husband, the King of France, and herself, and those of the nobility of Scotland, was, that 24 worthy men of the realm be chosen by the states, of which the King and Queen was to choose

seven, and the states five, to be an ordinary council for the administration during their Majesties' absence: and if any of the seven chosen by the King and Queen happened to die, their Majesties were to choose another out of the said 24; and if any of the five chosen by the states happened to die, the remaining part of those whom the states had chosen were to name another out of the said 24; and if the states thought expedient to add two more to their number, the King and Queen were to choose one, and the states another. To which the court deputies agreed, provided it should be no prejudice, for the time to come, to the King and Queen and the rights of the crown;† which were nothing but words of course, to please the court, for the states had formerly been in possession of this power, as we have seen already.

We find, likewise, that the parliament named and elected the privy counsellors until King James VI. attained the age of 21, as appears by the list of the unprinted acts of parl. 5, 6, 7. Parl. 10. cap. 17. it appears that the lords of the council and officers of state were appointed in that parliament: and after he came of age, we find, among the unprinted acts of parl. 11. there is one concerning the privy council. In that of parl. 12. we find one about the nomination and establishment of the privy council. And parl. 22. c. 11. we find that the King, with the advice of the three Estates, appointed and

† Knox's History and Spotswood's History, though the latter prevaricates, and passes over the parliament's first choosing the 24.

named the Queen's council ; which refers to another act in 1593. that had been made for the same end.

This, and what hath been said before, is sufficient to shew that it was no imposition upon King Charles I. when the parliament of Scotland demanded a share with him in choosing and naming his privy council, officers of state, lords of session, president of parliament, &c. which he granted by the 15th, 20th, 21st, 22d, 23d, 29th, 50th, and 65th acts of the last session of his second parliament.— The reasons of his agreeing to it mentioned in the said acts, are his absence for the most part out of the kingdom ; and because on their care, wisdom, and fidelity, in their several judicatories (which, next unto the supreme court of parliament, are the chief and principal judicatories) depend the welfare and happiness of the government. Both these reasons are permanent, for the absence of our Kings from Scotland is now become customary, and in all probability by themselves judged necessary : and the other reason is of perpetual force, and therefore not only justifies the demands of our parliament then, and proves that those privileges were of a much older date than 1641. but will justify the same demands in our parliament now when they come to settle the succession.

The Power of the Estates, about annexing and alienating the Revenues of the Crown.

Another of the *jura majestatis*, is the annex-

ing, appropriating, dissolving, or otherwise disposing of the crown lands, or other revenues of the crown ; and what share our parliaments had in this matter, will appear by the following acts.

In the acts of King David the Second, Nov. 6. 1357. it is statute and ordained, That all lands, rents, and possessions, which of old pertained to the crown, or the King's domain, should perpetually remain in the possession of the King, for his sustentation and living, without any alienation thereof. And, September 27, 1367, it was statute, for the King's better sustentation and living, that all rents farms, canes, customs, forests, offices, and other emoluments whatsoever : and also all lands, as well the property, and others in possession, whereof King Robert I. father to King David II. deceased, as of fee, and that all possessions and lands which pertained to the right and property of the crown, the time of the said King Robert, or of King Alexander III. or of the said King David II. should return all and whole to the crown, with all advocacy of kirks, and all service pertaining thereto, to remain perpetually with the crown, notwithstanding any alienation thereof made to any person ; and that no disposition thereof be made thereafter without consent of the three Estates.

In the acts of James I. cap. 6. the parliament consents, that the great and small customs be given to the King during his life ; and that those who had a claim to any part of the said customs, shew their said claim to the King, who is to give answer with the advice of his council. Cap. 9. the parlia-

ment thought fit the King should make enquiry by the sheriffs what lands, possessions, or annual rents, pertained to him and his ancestors, David, and the two Roberts, and might summon his tenants to shew their charters. Cap. 14. the parliament determines what mines shall belong to the King, viz. such, of whom it can be proved, that three halfpennies of silver may be fined out of the pound of lead. Cap. 148. they annul the gift of any lands from the crown by the governor.

In the acts of King James II. cap. 2. they revoke all alienation of lands, possessions, and moveable goods made, or that shall be made, without the consent of the three Estates, till the King arrive at the age of 21. Cap. 8. they confirm the King in the possession of all that his father had at the time of his death. Cap. 43. the parliament, considering that the poverty of the crown is oft-times the cause of the poverty of the realm, therefore statute and ordain, that there be certain lordships and castles named, annexed to the crown perpetually, not to be alienated without the advice and decree of the whole parliament, for the great, evident, and reasonable causes of the realm; and if the King, or any of his successors, alien or dispose the said castles and lordships so annexed, such alienation or disposition is to be of no avail; and that the King and all his successors be sworn at their coronation to observe this statute, and all the articles of it.—This shews that the author of the appendix to Spotswood's History is mistaken, when he says, that there was no provision made about the coro-

nation oath in our laws, till the time of the Reformation. It is, moreover, observable, that in the 17th chapter of the statutes of Robert II. the King promises, on his royal word, faithfully to observe all the laws enacted in that parliament, which is in effect the same thing with an oath: And it is known that King James III. promised, with the help of God, to cause justice to be equally administered to all his subjects, as may be seen in the 100th chapter of his acts. So that, though there be no express form of a coronation oath, there was that which was of equal force and validity; for, in the proposition of the field of Sterlin, the parliament charge the King expressly with breach of articles.

In the acts of King James III. cap. 86. there is a revocation of all alienations, infeftments, and gifts in prejudice of the crown, and the gifts of keeping of castles, especially those that are the keys of the realm. Cap. 87. the earldom of Ross is annexed to the crown for ever, without power of alienation.

In the acts of King James IV. cap. 17. all alienations, gifts, grants, &c. made by King James III. in prejudice of his crown, since the 2d day of February last, are made void, because they were granted since that time for the assistance of his perverse council, that were contrary to the good of the common realm, and the cause of the slaughter of King James III. and several others his barons and lieges. Cap. 24. they revoke all gifts, donations, infeftments, feu-farms, &c. given by the King

to any person since the day of his coronation. Cap. 41. they order all those who had grants, as above-mentioned, from King James III. to bring in their evidences to be destroyed. Cap. 82. they again revoke all the donations made by King James III. after the 2d day of September, 1487. Cap. 83. the King revokes all that had been given away from the crown by his father, or by himself in his youth, in prejudice of the crown, because he had sworn at his coronation, that he would observe and keep the right, honour, pre-eminence, and privileges, in lands, rents, possessions, duties, and other things thereunto pertaining: And because the Estates of the realm judged it profitable that the King have lands, lordships, and possessions, for the maintenance of his dignity, and the defence of his lieges and realm. Cap. 125. they give leave to the King to set all his lands in feu, but without diminution of his rental, gressoums, or other duties.

In the acts of King James V. cap. 40. we find the like revocation; and cap. 96. there is an annexation of several lands therein mentioned to the crown; and cap. 97. leave given him to set his lands in feu, but without diminution of his rental, &c.

In the acts of Queen Mary, there is the like revocation by the Queen Dowager in her first parliament; and cap. 23. they order the Queen's forests to be cut down for the welfare of the realm.

In the acts of King James VI. parl. 8. among the acts not printed, we find one mentioned which

annuls certain alienations and dispositions made in favour of the King. Parl. 10. cap. 17. there is an act for revocation of the King's property, wherein it is owned by the King, that several former revocations had been of no effect, because new grants and purchases had been procured from him by importunity; and he promises, on the word of a prince, inviolably to observe this act, and to abstain from all such new dispositions, and to allow of that good form in his house, which the lords of his secret council and officers of state appointed in that parliament, should determine to begin on the first day of January next; and that his warrant to the comptroller should be no security for paying pensions, fees, or wages, contrary to this act. Parl. 11. cap. 29. the temporality of benefices is annexed to the crown, because, during the prevalency of superstition, the greatest part of the patrimony of the crown had been given to abbeyes, monasteries, and other clergymen, by which the crown was greatly damaged and many inconveniences brought upon the realm. Cap. 30. there is a dissolution of annexed lands, for setting the same in feu-farm:— And cap. 31. there is a revocation of all that had been granted, given, or sold from the crown, contrary to the laws of the land, and without the consent of the three Estates. Cap. 78. it is enacted, that the treasurer's accounts shall be audited in parliament. In his 13th parl. cap. 176. there are several lands annexed to the crown, not to be alienated without the consent of parliament, and for great reasonable causes concerning the welfare of

the realm ; and if the King, or any of his successors, should alienate the same, such alienations to be of no force. Cap. 189. the abbey of Dumfermline is annexed to the crown, and the reason given is, that the poverty of the crown is the special cause of the poverty of the realm ; and that the patrimony of the crown being augmented, it is great profit both to the King and to the subject.—Parl. 16. cap. 2. forfeited lands are annexed to the crown, and not to be alienated without consent of parliament.

In the reign of King Charles the First, parl. 1. act 9. there is a revocation of all grants contrary to the laws of the kingdom. Act 10. annexations to the crown are ratified, without power to alienate the same.

In the reign of King Charles the Second, parl. 1. sess. 1. act 53. this act was ratified. Sess. 2d. act 8. there is a general revocation by the King, according to the practice of his ancestors.

In the reign of King James the Seventh, when our constitution was tore up from the very foundations, the power of the parliament was so far acknowledged, that in the second act of his first parliament, there was an act made for the annexation of the excise to the crown. Act 40. the offices belonging to the late Earl of Argyle were annexed to the crown. Act 42. the estates of several forfeited gentlemen were likewise annexed to the crown. Parl. 2. act 1. there is a dissolution of several estates from the crown, in order to be conferred upon such as the King thought deserved

them. Acts 7, 9, 13, 26, 27, 28, 29, there is the like.

The Kings of Scotland not the original or sole Fountain of Jurisdiction, nor the Parliaments anciently their Baron Courts.

There needs no more but the perusal of these acts, to satisfy any man, that the Kings of Scotland were so far from having an absolute authority over the estates of their subjects, or the like power over their parliament that a baron has over his courts, as has been unjustly alledged both in word and writing, that they had not a power to dispose of one foot of the lands, or of one penny of the revenues belonging to the crown, without the consent of parliament. By these acts it is likewise evident, that the patrimony and revenues of the crown were the gift of the people; and that the reason of their gift was to enable their princes to defend the country. We may easily see then how little foundation our royalists have for their darling maxims, that our Kings had always a title to their crown by hereditary descent, and an absolute authority and uncontrollable power over the persons and estates of their subjects, when from reign to reign it is manifest, by the acts above-mentioned, that they derived their title both to the crown and its revenues, from the consent of the Estates, and that they could neither alienate the one or the other without their concurrence. Whereas it is evident from the constant practice of our own and

of all other nations, that barons derive no title or authority over their lands and vassals from their baron courts ; but, on the contrary, those courts derive all their authority from the barons, who are the hereditary proprietors of their estates, might have disposed of them as they had pleased, and chose what vassals they would, because no man can have a right to any part of their Estates as a vassal, but by a feudal covenant with themselves or their ancestors.

Against this it is objected by Sir George Mackenzie and others, that since we had Kings before we had parliaments, it is evident that the King's power could not flow from them ; but on the contrary, that the King is the fountain of all jurisdiction, and that by consequence their power must flow from him.—*Institutions, page 12.*

But the answer is easy, Sir George equivocates upon the words *parliament* and *fountain of jurisdiction*. That we had parliaments at first in the same form and method as we have them at present, there is no man asserts ; but that we had proprietors of lands, and of such towns and villages, or other places of dwelling as were then common in these parts of the world, there is no man will offer to deny : and if those proprietors agreed, by common consent, to confer the sovereignty or right of government upon any one person, as it is evident from our history they did upon Fergus the 1st, whom they sent for from Ireland for that very end ; we may as justly say, that we had a parliament or meeting of the Estates before we had a King, and that he derived his royal authority from

that parliament or meeting, as we can say that we had a convention of Estates before we had King William, and that he had the same dignity conferred upon him by those whom we now call our Estates of parliament.

Then as to the fountain of jurisdiction, the equivocation there is every whit as manifest; for if we form our idea as we ought to do, from the thing, and not from the word, we shall find the word *fountain* to be improperly made use of in this case. A cistern, which is but a secondary fountain, would suit the notion much better; for the original fountain is certainly the people, who conveyed that power to the crown as to a cistern, from whence, by their own advice and direction, it was dispensed, from time to time, for the good of the society, as appears by the above-mentioned acts of parliament.

The Origin and Causes of Wardholding in Scotland considered.

There are two objections made against this, viz. the ancient and immemorial tenure of holding lands of the crown, by which the proprietors were obliged to do suit and service in parliament, and to attend the King's host; and the gift that was made of the lands of the kingdom by Malcolm to the nobility and gentry; which shews that the fountain of power, and the property of the country, was in the King, and not in the subject.

It is answered, 1. That we have the unanimous

and concurrent testimonies of all our historians, that the clans or families, under their *phylarchi*, who were their chieftains or heads, were possessed of the islands and west of Scotland, before we had any King; which makes it evident that the property of the country could not come from the crown. 2. Those historians are all of them as positive, that those *phylarchi*, or chieftains of the islanders, the same with the present chieftains of the highlanders, being almost of equal power and authority, sent for Fergus from Ireland, and made him King by unanimous consent, that he might assist them with his forces, and be their general in the war against the Britons. This makes it as evident, that the original fountain of our Scottish government was likewise in the people.

It remains then that this tenure of holding lands of the crown could not derive its origin from this, that the King was sole proprietor or self-holder of the country, as the Czar of Muscovy calls himself, but must have happened one of these two ways: 1. That all men of estates, or lords of manors, did, at the first institution of our monarchy, oblige themselves, for the support of the government they had agreed upon, to pay an acknowledgment to the crown, to assist the King with their counsels, to serve him in the administration, and to maintain his authority by their arms, both against foreign enemies and domestic rebels, and all this in proportion to the estates they were possessed of. So that as they invested the King with a sovereignty over their persons, they did in like

manner invest him with a sovereignty or *dominium directum* over their estates, to be held in his name as the head of the government; but all to be managed by the advice of those lords of manors, who were afterwards called lords of parliament, and had a joint share with them in all those things which are called the *jura majestatis*, as is plain from the tenor of our statute books.

2. After the monarchy was settled, and that more lands came to be disposed of, either by conquests from our neighbours, or by the forfeitures of rebels, they fell to the King as *ultimus hæres*; and such part of them as the parliament thought necessary for the support of the government, was irrevocably annexed to the crown, and other part was dissolved to be conferred in the King's name, and on the usual tenure, upon such as had merited rewards by serving their country; but always with consent of parliament, as we have seen already.— This is so plain, that even in the beforementioned acts of James VII. who assumed a more despotical power than ever any of his predecessors durst aim at, the lands which fell to the crown by the illegal forfeitures of his reign, were, by consent of his packed parliaments, bestowed upon the Duke of Gordon, the Earl of Melfort, Sir Theophilus Oglethorp, and others, whose services, on which they founded their merits, are taken notice of in the narratives of the said acts. So much had even the parliaments of that reign thought fit to preserve of our ancient constitution.

This is sufficient to explain how Malcolm II.

is said to have disposed the lands of all the kingdom among the nobility and gentry in feu, admitting the matter of fact to be so : But though it be asserted by Sir John Skeen, upon the word *Relevium*, in his book *de Verborum Significatione*, and likewise by Sir Geo. Mackenzie in his *Institutions*, from the authority of Malcolm Mackenneth's laws, cap. 1. it is no way probable. Buchanan says, it was only the crown lands, or rather King's lands, *Agros Regios* ; which may be allowed to be a good and just explanation of the words of the said law, which are, *totam Terram Regni Scotiæ*, because in the 2d article of the law it is said, the King retained nothing in property to himself, but the royal dignity, and the Mute-hill of Scone : So that it would seem there is nothing else meant by *Terram Regni* but the lands of the crown, which were his property, as King. The prefacer to Knox's history says the same with Buchanan, and there is reason to think them in the right : for though the ancient Scots might part with that which is called *Dominium Directum*, or superiority, to their King when they first set up one, which agrees with the maxim of law, that the superiority of all the lands in Scotland is vested in the King *de jure Coronæ*, it is very improbable that they would part with the *Dominium utile*, and so of proprietors transform themselves into mere tenants. Therefore Malcolm must either have only given away his crown lands among them, in lieu of which the barons gave him the ward and releeve of their heirs, or he must have prevailed upon them, by that distribution, to change

their ancient tenure, whatever it was, into that of wardholding. But however this be, the matter was transacted in parliament, which shews that the authority of the Estates was requisite to make it current : and if we may be allowed to form conjectures in matters so remote from our own times, this distribution was so much the more tempting, because the crown lands must needs have been much enlarged by the victory he had formerly obtained over Grimus, his competitor, and his party, and likewise by the countries of Murray-land and Buchan, newly reconquered from the Danes, who being accustomed to murder all the people where they came, because of their hatred to christianity, much of those countries must have fallen to the crown for want of heirs.

It appears, also, by Sir George Mackenzie's account of that matter, and Sir John Skeen's notes upon that law, that there was a paction betwixt King Malcolm and the subjects, when they agreed to hold their lands by this tenure : and by our historians Buchanan and Lessly we are informed, that the dividing of the crown lands among them, and erecting their estates into baronies, which, we know, made every baron a petty sovereign, and gave them power of life and death in their own jurisdiction, was the valuable consideration upon which they agreed to it ; whereas, had the King been absolute proprietor of all the lands in the kingdom there is no probability that he would have purchased their goodwill at such a rate. But if his feuing out the whole lands of Scotland among

them, be really the meaning of this law, we can understand nothing else by it, but that he and his parliament agreed, that their ancient holding, which, it is probable, was only to assist him in the defence of the country, in the legislature and administration, should be changed into that which the feudal law calls wardholding, or *Servitium militare*, by which the King had the estates of minors till they came of age, except what was necessary for their education, and also the right of matching them, and receiving their marriage-portion. This origin of wardholdings in Scotland, is doubted, however, by our historian Buchanan, who thinks that we first received that custom from the English and Danes. But admitting it to be otherwise, and that King Malcolm the Second first introduced this custom, it can no more be thought, that he, by his sole authority and personal property, divided the lands of Scotland among the barons, &c. into feuholdings, because the thing goes in his name, no more than our Kings can be thought to have made all our acts of parliament by their own personal authority, because they are called the King's laws. The reason of which is plain, because he is at the head of the legislature, as well as of the administration, and consequently has the honour of having all transacted in his name, though not by his sole authority; and therefore we find, by the statutes of Robert the Third, cap. 33. that the barons were not obliged to change their superior, without their own consent, though the superiority were alienated by the King.

Besides, the authority of the book called *Regiam Majestatem*, which contains those laws of Malcolm the Second, is questioned ; and that the feudal law was in use so early as his time in Scotland, we see is justly doubted. Wards and releeves therein mentioned are not allowed to be so old ; and it is supposed, that the courts of judicature and the King's household, were scarcely then so constituted, as there they are alledged to be.* So that a matter of this importance cannot be defended by such a questionable authority, against so many express acts of parliament, which evidently shew, that instead of the King's giving lands to the subject, the Estates gave lands to the King, and tied him up from alienating any part of them without their consent, which, if he obtained, it was their gift as well as his ; and so we must judge this distribution under consideration to have been their act as well as his, whatever King's reign it happened in, whether in that of Malcolm Mackenneth, or in that of Malcolm Canmoir, though it is justly suspected, as has been said already, to be of a much younger date than either of them : And here, also, it is proper to observe, that the note upon the margin of Malcolm's laws, saying they are proved to be authentic by the parl. 14. James III. cap. 113. is a mistake ; for cap. 113 says nothing of them, and cap. 115. which, it is supposed, the author meant, speaks only of revising *Regiam*

* Craig de Feudis, lib. 1. cap. 8. Nicholson. Scot. Hist. Library, p. 258, 260.

Majestatem, &c. but has not one word of Malcolm's laws, which are prefixed to the said Regiam Majestatem, under a distinct title.

As a further evidence how weak a foundation this story of Malcolm is for our Royalists to build on, let us consider how much Sir Thomas Craig fluctuates and wavers upon it, though one of the greatest lawyers that ever Europe bred, and as well acquainted with the laws of Scotland as any man. In his book *de Hominio*, or Scotland's sovereignty asserted, cap. 3. he informs us, that the feudal law did not come into Britain, till it was brought in by the Conqueror, whose expedition did not happen till anno 1066. He tells us further, that Peter Rebuff, in his declaration of the feudal law, says, that the name of feu was not heard of in Britain till the year 1170. Yet, Sir Thomas, in his book *de Feudis*, under the title *de custodia quam Guardam sive Wardam dicimus, et Relevio*, says, that the feudal law began to be practised everywhere some years before Malcolm; that there is a statute by his father Kenneth, ordering that the wardship and marriage of heirs should belong to the superior: but it may be that Malcolm brought this custom first in use among us. He tells us in the same place, "That he is very much in doubt as to
 " the original of this wardship; love to his coun-
 " try, and the common opinion not only of great
 " men, but almost of all men, makes him willing to
 " ascribe it to Malcolm, the son of Kenneth, who,
 " having subdued the Danes in many battles, and
 " forced them out of the kingdom, he exhausted his

“ own private estate and the revenues of the crown
 “ by military donations, and is said to have assem-
 “ bled his nobility at Scone ; and having declared to
 “ them his poverty, which was not occasioned by
 “ prodigality, or any other ill management, but by
 “ his necessary expences in the war, he prayed them
 “ to consider his poverty, and to make such provi-
 “ sion for him, that he might be able, in time to
 “ come, to live according to his dignity. The no-
 “ bility being sensible how much they were oblig-
 “ ed by his donations or grants, and conceiving
 “ that, by this complaint, he designed to redemand
 “ those lands which he had given them for their
 “ loyalty and valour, to prevent that, they grant-
 “ ed him the wards and releeves.” And this he
 says was also the opinion of William Terren, a
 learned Norman, in his Commentaries on the Nor-
 man Constitution, who, he tells us elsewhere,
 thought the feudal law was practised in Scotland,
 before it was practised in Normandy. And per-
 haps not without ground ; for, though the feudal
 law might not be practised so fully in Scotland, in
 the reign of Kenneth, and Malcolm, his son, as it
 came to be afterwards, yet it is not improbable
 that Fergus II. who joined the Goths in their war
 upon the empire, might bring in part of the Gothic
 constitution, afterwards called the feudal law, into
 Scotland. And this, perhaps, may be the best so-
 lution that can be given for those footsteps of the
 feudal law, which Sir Thomas Craig finds in Ken-
 neth and Malcolm’s acts, though before the time
 that the said law was generally received in this

island, or practised, it may be, anywhere else in Europe, but where the Goths had settled. But still we see it is agreed on all hands, that it was brought in by consent of the Estates, which shews that our Kings were not absolute. But granting our royalists their proposition, that Malcolm distributed all the lands of Scotland in feu, as being his own property, it will not bear their conclusion, that our Kings must therefore be absolute, since any man who casts his eye upon Sir Thomas his book *de Feudis*, under the title *de veterum Judiciorum Forma in causa Feudali*, will see it there fully proved, that, according to the constitution of the feudal law, there are many cases, wherein the superior may forfeit his right of superiority over his vassals, and that he must also be determined by their judgment in controversies betwixt him and others of their fellow-vassals or peers; and that when princes had any controversies with their vassals, they were to make use of the judgment of their council (under which we know parliaments are comprehended) which to them were instead of peers. But there is this, which ought for ever to put an end to that controversy: Vassalage is owned by all men to be founded upon the donation of a benefactor; and since it appears undeniably, from our histories and acts of parliament, that the crown, and revenues for the support of it, were the gift of our ancestors to our Kings, our Kings must, in strictness of sense, have been the vassals, according to this foundation, and our Estates the benefactors or superiors. Or it proves so much at least, that

our princes were originally no more than the public servants of the nation, and therefore we are not to wonder that our ancestors treated them accordingly.

To set this matter in a clearer light, and to make it evident that the King was not sole proprietor of the lands of Scotland, we need only to observe the following passages of our history :—1. That in a meeting of the Estates, Conarus, our twenty-fourth King, is taxed, for bestowing the public patrimony of the crown upon villains, and advised to revoke it ; and at the same time they refused him a tax upon their estates : whereas, had they been tenants at will, he could have turned them out when he pleased ; or, had they been mere vassals, he might have seized their feus for not granting him an aid. 2. When Fergus the Second recovered the kingdom from the Romans and Britons, Græmus, his father-in-law, who was appointed guardian and viceroy to his children during their minority, divided, by the consent of the estates or nobles, the conquered lands among new colonies, and gave estates to foreigners and others, who had followed him in the wars. 3. When King Kenneth exterminated the Picts, he divided the conquered lands among his followers, according to their valour ; wherein, though Buchanan does not say so, we are not to doubt but he followed the advice of the estates, as others had done in the like case before him : But so much, however, is gained by it, that it destroys the fancy of Malcolm's being the first who divided all the lands

of Scotland among the barons. 4. In the reign of Kenneth the Third, we find that the honours and lands conferred upon Hay and his sons, by whose means the famous victory of Loncart was obtained over the Danes, was by consent of parliament.

The Power of the States of Scotland, in disposing of the Sovereignty and Succession; and the Origin of our Kingly Government enquired into.

VI. A 6th thing, and which indeed ought to be reckoned the chief of the *jura majestatis*, is the power of disposing of the sovereignty upon families or persons. This has been touched by the way in the preceding discourse; but since it deserves a particular chapter or section by itself, we come now to consider what power the States of Scotland have from time to time exercised in this matter.

We have already heard that the late Sir Geo. Mackenzie of Rosehaugh and other Royalists have been so bold as to assert, that we had Kings before we had parliaments; and that therefore the power and authority of our parliaments comes from our Kings, and that our Kings do not derive their power and authority from our parliaments. This was likewise the prevailing doctrine from the bench and pulpit; and generally speaking, the judges and clergy in Charles II. and James VII.'s time, were so far from keeping within any tolerable bounds on this head, that they had brought our

parliaments to be of no more significancy in effect, than the mock assemblies of the states in France, who are never called, but at the King's pleasure, to give him money. And as to this power of ordering the succession, they prevailed with one of those managed parliaments in King Charles the Second's reign, to make a surrender of it, in favour of King James the Seventh, a popish successor, by asserting, parl. 3. act 2. "That the
 "Kings of this realm derive their royal power from
 "God Almighty alone, do succeed lineally there-
 "unto, according to the known degrees of proxi-
 "mity in blood, which cannot be interrupted, sus-
 "pended, or diverted, by any act or statute whatso-
 "ever. — And that upon the death of the King
 "or Queen, who actually reigns, the subjects of this
 "kingdom are bound by law, duty, and allegiance,
 "to obey the next immediate and lawful heir, either
 "male or female, upon whom the right and adminis-
 "tration of the government is immediately devolved.
 "And that no difference in religion, nor no law,
 "nor act of parliament, made or to be made, can
 "alter or divert the right of succession, and lineal
 "descent of the crown, to the nearest and lawful
 "heirs, &c." This act, together with that of the
 test, and the oath therein enacted by the sixth act
 of that same parliament, swearing, "That it was
 "unlawful to take arms against the King, or those
 "commissioned by him, on any pretence whatso-
 "ever," made us as complete slaves, as the subjects
 of France and Turkey. And the narratives or
 preambles of those acts, were founded upon direct

falsehoods, both in matter of fact and law, as has been partly made evident already, but will more fully appear by what follows.

I shall begin with Bishop Lessly's authority; and that we may know how much it is to be relied upon, we are to consider, in the first place, that he was a popish bishop, and by consequence not chargeable with favouring presbyterian aristocracy, either in church or state. In the next place, he was so far from being a republican, that he was a vigorous assertor of his mistress, Queen Mary's prerogative in Scotland, and of her title to the crown of England, according to the then laws of succession. As to his qualifications, he was a man of honour, quality, and learning; and, as to his opportunities of knowing our constitution, no man could have better, for he was bred to the law, took his degrees of doctor in that faculty, was a judge, and for the most part of his time employed in great affairs of state, and was one of those commissioned by Queen Mary, to collect our acts of parliament from the records, in order to their being printed, as appears by that Queen's commission, prefixed to the first impression of our acts of parliament, commonly called the Black Acts: and therefore, since he had those excellent opportunities, though he writes with an air of ingenuity that is seldom to be found in a courtier, we have no reason to suspect his testimony in favour of the people's freedom. His temptation lay on the other side, for the States of Scotland had dethroned his mistress, and forbidden by law the exercise of his religion.

Yet he was so far from seeking a revenge, by running down the power of our states, and exalting the royal prerogative above all laws and limitations, as our protestant bishops have done, that he is very just in his historical account of our constitution; he could not offer that violence to his light, and to that ocular demonstration of our freedom, which his perusal of our ancient records and histories afforded him, as to transform all the people of Scotland from freemen into slaves, and all our freeholders into mere tenants at will, or the basest of vassals, as Sir George Mackenzie, and some others of our late protestant court-writers have done, and to which Archbishop Spotswood has given but too much countenance in his history.

Therefore Bishop Lessly, instead of deriving the power and authority of our Kings from God alone, gives us a very plain and fair narrative of the occasion and manner of choosing our first King, and makes no scruple to own that our original government was an aristocracy by the heads of clans, who were chosen themselves by those clans or tribes over whom they presided. He tells us, that upon the first arrival of our ancestors in Ireland, they chose themselves a King of their own number;* and that even unto his own time, that original custom of choosing their prince continued in Ireland, so as their lords and heads of clans came to the government of their own territories or es-

* P. 46. edit. quarto, 1675.

tates,* by the suffrage of those of the same clan,† as well as by succession. Though he informs us, indeed,‡ that, for avoiding discords and slaughters, they agreed, by the advice of Thanaus, to choose Simon Brechus and his posterity their hereditary princes.

When he comes to speak of our arrival in Albion,§ he tells us, that every tribe chose themselves leaders, who are now called chieftains:¶ and they continued under this form of government for many years; nor did they submit themselves to one Governor or King, till, being attacked by the Picts, at the instigation of the Britons, they sent for help from Ferquhard, King of Ireland, and made his son, Fergus, who came to assist them with numerous forces, their King.¶¶ The manner of it he describes thus, that Fergus arriving in Argyle,** he held a consultation with the nobles or heads of clans,†† and proposed to them, whether they thought it more commodious, that the sovereign power should be lodged in their nobles and heads of families, as in former ages, or in one King; and protested he was willing to submit to what they should agree on. Upon this, none of the clans being willing to submit to another, they all agreed to make him King. This is the very same account which Buchanan gives of it; and therefore, since Bishop Lessly and he were men of different principles and interests, there is no reason to think that they

* Dominia.

† Contribulium Suffragiis.

‡ Page 47.

§ Page 48.

¶ Capitaneos.

¶¶ Page 48, 49.

** Page 77.

†† Populi primoribus.

would agree to forge this story, but on the contrary, that both of them wrote according to the evidence they had from our ancient writers and records.

But since the truth of this is disputed, not only by some neighbours who envy our antiquity, but even by some of our own countrymen, who had rather sacrifice our honour, and the nation itself, than not have us slaves to princes and bishops; let us see what we can have from foreign authors, to prove that the ancient form of government in this island was in petty princes, heads of families, or governors of cities. We shall allow Julius Cæsar the first place, in regard of his quality and learning; he tells us in his Commentaries,* that when his design to invade Britain was known, many cities of that island sent ambassadors to him into France, who promised to give him hostages, and to submit to the Roman government: Which they could not have done, had the whole island, or the southern parts of it, been subject to any one prince, for the deputation must then have been in his name. He further informs us, in the same place,† that when he did actually invade Britain, the princes of the country assembled from all places, and submitted themselves and their cities to his command. But afterwards perceiving that the Romans were few in number, and that they wanted horsemen, ships, and provisions, they revolted.‡

* De Bello Gallico, lib. 5.

† Sect. 27. edit. Amstelodam. 1697.

‡ Sect. 30, 31, &c.

Being worsted in battle, they again submitted.— But when he returned to Belgium, now the Netherlands, there were only two of the British cities that sent hostages to him.*

In his fifth book,† where he gives an account of his second expedition into Britain, he mentions Cassivelaunus, whose dominions were divided from the maritime towns by the Thames. Before the arrival of the Romans, this prince had been at war with the neighbouring cities; but upon this second invasion, he was, by common consent, elected general in this war against Julius Cæsar. There, likewise, he takes notice, that Cassivelaunus had killed Immanuentius, King of the Trinobantes, whose son, Mandubratius, fled to Cæsar, in France, and was by him afterwards restored to his father's dominions.‡

In the 22d section, he informs us, that Cassivelaunus, who, we have heard before, was, by common consent, chosen general in this war, sends orders to four Kings that governed Kent, to attack the Romans, by way of surprize; which makes it evident that the country was then governed by many little princes.

The next we shall bring is Cornelius Tacitus, another author of great quality, parts, and opportunity, to whom our country is much obliged for the honourable character he gives of the valour and bravery of our ancestors. In his life of Julius Agricola, he tells us, that the Caledonians being

* Sect. 38.

† Sect. 11.

‡ Sect. 20, &c.

taught, at last, that mutual agreement among themselves was necessary for withstanding the common danger, they did, by embassies and leagues, assemble together the strength of all their cities; and, forming an army upon the Grampian hills, amongst other captains, Galgacus, the most considerable for birth and valour, made a noble speech to them, wherein we have that memorable sentence, *Let us shew them (says he) at the first charge, what brave men Caledonia has reserved in store.* We must necessarily suppose that this Galgacus, who is thought to be our Corbredus II. surnamed Galdus, was chosen general in this war by the other Caledonian princes or captains, in the same manner as Cassivelaunus was by those of South Britain.—Or if he were King of all that part of the island then named Caledonia, according to our historians who make him the 21st in our catalogue; it is evident he had not an absolute power; and that our government, though it had a single person at the head of the administration, consisted of the chiefs of families and cities associated; otherwise Galgacus might have summoned them together against the Romans, by his royal authority, and needed not have been at the trouble of assembling them by leagues and embassies. This relation of Tacitus agrees very well, however, with what is said by our own historians concerning our first Kings; that they acted in every thing, by the advice and authority of the *phylarchi*, or *primores populi*; and it is very probable that Galgacus was our King, otherwise he could scarcely be said by this Roman au-

thor to be *inter plures duces genere præstans*, to be the noblest or most high born of all the captains : Since our own historians say of our chieftains of clans, that they were *pari pene dignitate*, almost all of equal degree; and therefore his ancestors must have been conspicuous above the rest of the chieftains for some succession of time, before he could be said to be higher born than the others.— This is no way inconsistent with what our historians say of the antiquity of our nation, or of our royal line : For, though they were not monarchs in the modern sense, yet being *inter cæteros principes*, as a Roman Emperor said of himself, and the chief place of the administration in peace and war being always given to one of Fergus's offspring, sometimes in a direct, but, for the most part, in a collateral line, till the time of Kenneth III. that the government was made hereditary ; all the remarkable things which befel our nation are reckoned to the time of their respective governments or reigns, as the remarkable events of the Roman government are noted to have fallen out in the time of such a consul, dictator, or emperor. For, it is evident from history, that the emperors were only generals for a considerable time, though they were afterwards made hereditary sovereigns : And our ancestors being under a necessity of having a constant general to command them in their wars against the Britons, Picts, and Romans ; and those generals, as has been said already, being always of Fergus's line, they were probably, by latter historians, called Kings, according to the mode of their

own times, and by them placed in our catalogue as such ; though it would seem, by the accounts above-mentioned, from Cæsar and Tacitus, that they were scarcely known by that name in those days, and that they had not, indeed, such a power as after ages thought fit to constitute a King, or to make up that which is now called royal authority.

But, to return to Tacitus, he tells us further, in the same place, “ That the Britons were governed by Kings before the arrival of the dictator ; “ but now (says he) they are divided into factions by “ princes, and there is nothing more serviceable to “ us against those valiant nations, than that they “ do not consult together : For, it is very rare to “ find two or three cities who agree to ward off “ the common danger ; so that while they fight separately, they are all overcome.” And a little after, he adds, “ When the Britons bewail their “ servitude, they complain that they had formerly “ each of them their own King ; but now there are “ two governors imposed upon them, the legate, “ who preys upon their lives, and the procurator, “ who seizes their estates.” He says the same as to Ireland, that they were governed by many petty Kings (*reguli*.) He mentions also the Kings of the Silures and Brigantes, in Britain, and takes notice that Claudius Cæsar triumphed over Gethus, King of Orkney. It is likewise manifest, from Cæsar’s Commentaries, that every province in France had a King. Livy says the same of Spain ; and Vopiscus tells us, that there were nine German

Kings who met Probus Cæsar. From all this, it is evident, that nothing but an unaccountable bigotry for absolute monarchy, or a slavish parasitical temper, to fawn upon our late princes for preferment, could have prevailed with Sir Geo. Mackenzie and others of our modern authors to assert, that we had Kings before we had parliaments, that our Monarchs were absolute and uncontrollable, and derived their authority from God only ; since by these unquestionable authorities, it is evident, that anciently this island was governed by many petty princes : that in the time of Cæsar and Tacitus, all or most part of Europe was governed in the same manner ; and that Ireland, from whence our ancestors came, and derived their form of government, was governed by many *reguli*. So, that to assert Scotland at that time to have been ruled by one Monarch, in any other sense than that one of our princes was chosen by the rest to be general in war, and at the head of the administration in time of peace, is contrary, not only to those famous Roman historians, but to the then custom of all other nations in Europe ; which makes it far more probable that we had not then any such thing at all as a Monarch, but that our government in those days varied little or nothing from what it is said to have been at first by Bishop Lessly and Buchanan, to wit, an aristocracy by the heads of clans, chosen by those clans over whom they presided ; and that Galgacus or Galdus, being one of Fergus's line, was chosen general of all those clanships or lesser aristocratical governments, united together in a com-

mon league, as Tacitus says they were, against the Romans.

What still remains of that ancient form of government by heads of clans, in the highlands, adds a mighty strength to this supposition; and what was asserted by our estates in their memorial to Queen Elizabeth, to justify their deposing Queen Mary, confirms it; to wit, that to that very day, the clanships in the islands, and in those places of the continent, where the ancient customs and language still obtained, pleaded a right to elect and depose their chieftains. It is true, that custom is now less frequent, if at all practised; yet there was a fresh instance of it in their own memories, recorded in Bishop Lessly's history, in the reign of King James V. when the clan of Mackintosh chose Hector, a bastard son of the family, to be their chieftain during the nonage of the lawful heir.—The great families of Gordon, Argyle, and Atholl, may serve still to give us an idea of those ancient *reguli* or princes, and are perhaps greater than most of them were, because of other lesser clans which now depend upon them: and if the government of these clans have at present more of a despotical than of that aristocratical power which Bishop Lessly says they formerly had, that is owing to the corruption of succeeding times.

From the time of Fergus I. till that of Fergus II. the power that our *phylarchi* or states exercised in the government, and in disposing the sovereignty itself, is so plain from our history, that it cannot be denied: And never was any of our princes hap-

py that did not govern by their advice, according to a law made in the time of Finnanus, our 10th King, or captain-general. And Corbedus Galdus, our 21st King, so famous for his victories over the Romans, took a solemn oath, as we are informed by Bishop Lessly, in his life, that he would do nothing, without consulting his states or nobles, or against their will.

We come next to the reign of Fergus II. which some of our envious neighbours will have to be the first time of our settling in the island, though the contrary appears expressly from Bede, one of the ancientest as well as best of the English Saxon historians. It is plain from our own writers, that this Fergus was sent for from Denmark or Scandia, by the remainders of the Scots, who still kept possession of the isles, notwithstanding the united force of the Romans, Britons, and Picts ; and that he derived his title from the people, who might, had they pleased, have set up any other in his stead ; but being of the royal line, and famed for his achievements against the Romans, in conjunction with the Goths, whom he accompanied in their war upon the empire, as before-mentioned, they chose him, as a person under whose conduct they hoped to recover their country, and effected it.—From his time, to the reign of Kenneth III. the government was still continued in the royal, but not in a direct line, the states reserving still that power to themselves to chuse such of the family as they thought fittest.

When Kenneth III. came to the crown, his

ambition prompted him to have the succession made hereditary ; and he prevailed with the parliament to abrogate the old law made by Feritharis our second King, that if the children of our Kings were under age, the next of kin, thought fittest to govern, should be set upon the throne, and after his death, the succession should devolve upon the children of the last King. Hitherto it is plain, that our ancestors understood nothing of that doctrine which derives the authority of our Kings from God alone. Nay, even whilst they were heathens, they had a much juster notion of the fountain of authority than many of our modern christians have. That noble Prince, Galdus, above-mentioned, is a plain instance of this : Bishop Leslie tells us, that upon his being declared King by the joint suffrage of the states, he gave thanks first to the immortal gods, and then to the nobility and people, for conferring the crown upon him.

We shall next take a brief view of what fell out most remarkable concerning the succession, after it was made hereditary by Kenneth III. It is evident from our historians that this law was much complained of, as depriving the states of their just suffrage in electing their Prince, and subjecting them to the casual government of children, women, and others, who stood in need of governors themselves ; therefore Bishop Leslie says, that immediately upon Kenneth's death, the nobility broke that law, and gave the crown to Constantin, the son of Culenus. Upon Constantin's death, Grimus was made King by the nobility and

people; but degenerating into a tyrant, they took part with Malcolm, Kenneth's son, against him, and Grimus falling in battle, Malcolm was made King; but, which was remarkable, did not meddle with the government, though it was made hereditary by his father's act, till he was solemnly invested with it by the states at Scone, where he prevailed with them to confirm his father's said law. Buchanan, in his 7th book, makes very severe but judicious reflections upon this act of hereditary succession, and asserts, with evidence enough from matter of fact, that all the public calamities and mischiefs which this law was made to prevent, were nothing in comparison of what befel our country by reason of this law, upon the death of King Alexander III. when Bruce, Baliol, and others, put in their pleas for an hereditary right of succession.

Malcolm leaving no son behind him, his grandson, Duncan, succeeded him, and was created King by universal consent, says Bishop Leslie; but being a man of a soft and easy temper, and by consequence not likely to have been admitted to the government, had it not been for the act of hereditary succession, his kinsman, Macbeth, grandson likewise to Malcolm, by a daughter, was made his general and viceroy, who conspiring against Duncan, murdered him, and usurped the crown: He prevailed with the nobility and people to confirm him in the government, having acquired the goodwill of the former by his bounty, and being grateful to the latter, because of his success in war

against the Danes : but he degenerated afterwards into one of the most horrid tyrants that ever was heard of; upon which the people sent to England for Malcolm Canmoir, (son to King Duncan) who had fled thither from Macbeth's fury, and joining him against the tyrant, Macbeth was defeated, and afterwards killed; upon which Malcolm was made King by universal consent. Malcolm being afterwards killed in the war with England, and leaving none but young children behind him, his brother Donald did, by the help of the King of Norway, usurp the crown; and his brother's lawful children having fled into England, the nobility chose Duncan, Malcolm's natural son, a great warrior, to be general against Donald; who being deserted by his troops when he came into the field, Duncan was made King: but Donald having found means to get him murdered, the nobility sent to England for Edgar, one of Malcolm's sons, who again subdued Donald, and put him in prison, where he died. Edgar having no children, his brother Alexander was sent for from England, and succeeded; and he being also childless, his brother David, a great and excellent Prince, came next to the crown; and all his children dying before him, his grandson, Malcolm, succeeded; he having no children, his brother, William, succeeded, fifteen days after his death: which shews that the consent of the states was at that time still thought necessary, before our Princes entered upon the administration. He was succeeded by his son Alexander II. and he by his son Alexander III. who, leaving

no issue but a grand-daughter, by his daughter the Queen of Norway, a convention of the Estates met about making a new King, says Buchanan, where they agreed upon six of the nobility to take care of the administration. Bishop Lessly says the same, with this addition, that Alexander left no issue to whom the crown could descend, by which it would seem that they did not then think themselves obliged by the act of succession to give their crown to a woman. With this convention, Edward I. of England treated of a marriage betwixt this Princess and his son Edward II. in order to an union of the kingdoms, which the Scots agreed to on certain conditions, but the lady died before the marriage: and then happened that fatal competition betwixt Bruce and Baliol, for our crown; the latter enjoyed it first, by the assistance of Edward of England, to whom he made a base surrender of our sovereignty. Baliol was upon this account dethroned by the Estates of Scotland, and his posterity for ever excluded from our throne, which was deservedly conferred upon Robert Bruce and his issue, because that Prince did so gallantly recover our liberty. In Bruce's time, an act was made for settling the succession, in order to prevent such troubles as the country was afflicted with, by the competition above-mentioned. By this act, the crown was settled upon his son, David Bruce, and his male issue; and failing that, upon his brother, Edward Bruce, and his male issue; and failing that, upon his own daughter, and her issue. This is the first time we hear of any woman men-

tioned in the entail of our crown ; but it is evident, that the King and States did not then think of the divine right of lineal succession, since they put Edward Bruce, the brother, and his male issue, in the entail, before the daughter and her issue. And to prevent such disputes as those above-mentioned about the succession, when the league with France was renewed, it was agreed, that when any doubt happened about a successor, it should be decided by the convention of Estates. And the King of France was obliged by the league to support that person on the throne, to whom the convention should adjudge the right. Bishop Lessly adds, that the obligation was mutual, and that the Scots were to give the like assistance to France, in case of any dispute about their succession. Edward Bruce being killed in the war, and leaving no issue, King Robert got the succession again settled on his own son, David, and his issue ; and failing that, on Robert Stuart, his grandson, by his daughter. From this it is evident, that the settlement of our crown by the last convention of Estates, upon King William and Queen Mary, and her present Majesty, was agreeable to our old constitution : and it plainly demonstrates the weakness of the objection, which some are pleased to raise against it, as being done only by a convention ; for here is an act of parliament giving a convention that power. Besides, this objection against the power of that convention proceeds from a mistake, because of two other sorts of conventions in Scotland, which are owned to be of less authority than parliaments. One is a con-

vention that used formerly to be called by our Princes upon their succession to the crown, in order to their being solemnly invested with the sovereign authority by the Estates, until which time we have seen by some of the above-mentioned instances, they could not well meddle as Kings with any other part of the administration; and until then they could not call a parliament, as is owned by the continuer of Spotswood's history, p. 31. and after this was done, they usually summoned a parliament.

There is another sort of convention which our princes have been used to call, since the union of the crowns especially, without any power to make laws, but only to assist the Sovereign with their advice in any great exigence of state, and to raise money; and this has created a diminutive idea of conventions in general, for want of distinguishing betwixt the one and the other. But a convention of the nature of that which was called at the Revolution, has the most august and highest degree of original sovereign power, that the nation, by themselves or their representatives, can exert, which is to make or unmake Sovereigns, as they find the case of the nation requires it; and, from conventions of that sort, our princes in all the revolutions of our government, have ever received their authority; and to such conventions before the union of the crowns, they were ever held accountable, as has been sufficiently proved already. Nor is there the least shadow of reason to think the authority of such a convention to be any thing less than that

of a parliament, because it is composed of the very same states, and is capable of acting with a great deal of more freedom : they meet, by virtue of the intrinsic authority of the nation, without any thing of those intrigues too commonly made use of by courts, to influence elections, and to dispose members, when elected, to act according to their interests, though opposite to that of the country ; but here they act, without any controul from the prince, because, either there is none till they make him, or, if there be, and that they meet without his authority, as they did in the first ages of our monarchy, and of late, in the reigns of King James III. Queen Mary, and King James VII. it is, that they may call them to an account for the administration of that trust which they received originally from the states ; and either to continue them in it, or to take it from them, as they find meet : and, indeed, it is the greatest solecism in nature, to say, that the states of a limited monarchy, like that of Scotland, conferred upon a prince in trust, should have less power without such a trustee of their own making, than they have when there is one.

I shall conclude this head with one observation more, which is, That those men who asserted, that *the right to the Imperial Crown of Scotland was, by the inherent right and nature of the monarchy, as well as by the fundamental and unalterable laws of the realm, transmitted and involved by a lineal succession, according to the proximity of blood*, as in the above-mentioned act of parliament, 3 Car. II. did not consider that, instead of doing the royal family

any service by that position, they fixed a charge of usurpation upon the whole line and race of the Stuarts, and according to their own principles, and the words of that act, *involved the subjects of the kingdom in perjury and rebellion* : for, it is undeniable that the right of succession, according to proximity of blood, was in Baliol's race ; for, Alexander III.'s line failing, the reversion came to the line of David Earl of Huntingdon, brother to William King of Scotland, whose eldest daughter was grandmother to John Baliol, and the second daughter great grandmother to Robert Bruce. This claim was, after Baliol's forfeiture and resignation, renewed by his son, Edward Baliol, who was, for some time, King of Scotland ; and it was again revived by William Earl of Douglas, who, upon David Bruce's death, put in his plea as next heir to the crown, because, descended from Baliol and the Cummins ; and had not the states determined it against the Lord Douglas, in favour of Robert Stuart, the Stuarts had never come to the crown. So that for one parliament to assert, that the descent which was made hereditary by a former, could not be altered by a future parliament, was not only contrary to sense, and the intrinsic power of all governments, but contrary to standing acts of parliament, which made it *treason to diminish the power of the three Estates, or any one of them* ; whereas this act diminished the power of all succeeding parliaments, which can never be limited, without destroying their very essence as sovereign courts : otherwise it should be in the power

of one parliament to make the nation papists or slaves for ever, and no future parliament would be able to reverse it. Whereas it is evident to common reason, and confirmed by daily practice, that one parliament may reverse what another has enacted, according as the good of the public requires it, for that is the end and *ne plus ultra* of all government; and, if governors of any denomination whatever, enact any thing contrary to the good of the public, it is *ipso facto*, null and void, because contrary to what is laid down by God and nature, as the unalterable rule and end of government. This is tacitly owned, even in the preambles of those acts in the beginning of King Charles II.'s reign, which surrendered our liberty; for the end there proposed *is the peace and happiness of the kingdom*, as may be seen, acts 1, 3, 4, 5, &c. But, since the experience of all ages is sufficient to convince mankind, that slavery or absolute subjection to the will of a prince, so as in no case to resist him, did never issue in the good of the people, that is enough to prove that such a subjection is inconsistent with the end of government, and therefore *ipso facto* null and void (though all mankind should agree to it) and reversible, whenever the Estates or body of a nation think fit to repeal it.

[illegible]

Appendix.

*Act for the Security of the Kingdom, brought into
the Parliament of Scotland, by Mr. Fletcher.*

‘ **T**HE estates of parliament considering, that when
‘ it shall please God to afflict this nation with the
‘ death of our sovereign lady the Queen (whom
‘ God of his infinite mercy long preserve) if the
‘ same shall happen to be without heirs of her body,
‘ this kingdom may fall into great confusion and
‘ disorder before a successor can be declared. For
‘ preventing thereof, our sovereign lady, with ad-
‘ vice and consent of the estates of parliament, sta-
‘ tutes and ordains, that if, at the aforesaid time,
‘ any parliament or convention of estates shall be
‘ assembled, then the members of that parliament
‘ or convention of estates shall take the adminis-
‘ tration of the government upon them: excepting
‘ those barons and boroughs, who, at the aforesaid
‘ time, shall have any place or pension, mediately
‘ or immediately of the crown: whose commis-
‘ sions are hereby declared to be void; and that
‘ new members shall be chosen in their place: but
‘ if there be no parliament or convention of estates
‘ actually assembled, then the members of the cur-
‘ rent parliament shall assemble with all possible
‘ diligence: and if there be no current parliament,
‘ then the members of the last dissolved parlia-
‘ ment, or convention of estates, shall assemble in

' like manner : and in those two last cases, so soon
 ' as there shall be one hundred members met, in
 ' which number the barons and boroughs before-
 ' mentioned are not to be reckoned, they shall take
 ' the administration of the government upon them :
 ' but neither they, nor the members of parliament
 ' or convention of estates, if at the time aforesaid
 ' assembled, shall proceed to the weighty affair of
 ' naming and declaring a successor, till twenty
 ' days after they have assumed the administration
 ' of the government : both that there may be time
 ' for all the other members to come to Edinburgh,
 ' which is hereby declared the place of their meet-
 ' ing, and for the election of new barons and bo-
 ' roughs in place above-mentioned. But so soon as
 ' the twenty days are elapsed, then they shall pro-
 ' ceed to the publishing, by proclamation, the con-
 ' ditions of government, on which they will receive
 ' the successor to the imperial crown of this realm ;
 ' which, in the case only of our being under the
 ' same King with England, are as follow :

1. ' That elections shall be made at every
 ' Michaelmas head-court for a new member of par-
 ' liament every year : to sit the first of November
 ' next following, and adjourn themselves from time
 ' to time till next Michaelmas : that they choose
 ' their own president, and that every thing shall be
 ' determined by balloting, in place of voting.

2. ' That so many lesser barons shall be added to
 ' the parliament, as there have been noblemen
 ' created since the last augmentation of the num-
 ' ber of the barons ; and that in all time coming,

‘ for every nobleman that shall be created, there
 ‘ shall be a baron added to the parliament.

3. ‘ That no man have a vote in parliament but
 ‘ a nobleman or elected member.

4. ‘ That the King shall give the sanction to all
 ‘ laws offered by the estates; and that the presi-
 ‘ dent of the parliament be empowered by his Ma-
 ‘ jesty to give the sanction in his absence, and have
 ‘ ten pounds sterling a day, salary.

5. ‘ That a committee of one and thirty mem-
 ‘ bers, of which nine to be a quorum, chosen out
 ‘ of their own number, by every parliament, shall,
 ‘ during the intervals of parliament, under the
 ‘ King, have the administration of the government,
 ‘ be his council, and accountable to the next parlia-
 ‘ ment; with power, on extraordinary occasions, to
 ‘ call the parliament together: and that, in the said
 ‘ council, all things be determined by balloting in
 ‘ place of voting.

6. ‘ That the King, without consent of parlia-
 ‘ ment, shall not have the power of making peace
 ‘ and war; or that of concluding any treaty with
 ‘ any other state or potentate.

7. ‘ That all places and offices, both civil and
 ‘ military, and all pensions formerly conferred by
 ‘ our Kings, shall ever after be given by parlia-
 ‘ ment.

8. ‘ That no regiment, or company of horse,
 ‘ foot, or dragoons, be kept on foot in peace or war,
 ‘ but by consent of parliament.

9. ‘ That all the fencible men of the nation, be-
 ‘ twixt sixty and sixteen, be, with all diligence pos-

‘ sible, armed with bayonets, and firelocks, all of a
 ‘ caliber, and continue always provided in such
 ‘ arms, with ammunition suitable.

10. ‘ That no general indemnity, nor pardon for
 ‘ any transgression against the public, shall be va-
 ‘ lid, without consent of parliament.

11. ‘ That the fifteen senators of the college of
 ‘ justice shall be incapable of being members of par-
 ‘ liament, or of any other office; or any pension,
 ‘ but the salary that belongs to their place, to be in-
 ‘ creased as the parliament shall think fit: that the
 ‘ office of president shall be in three of their num-
 ‘ ber, to be named by parliament, and that there be
 ‘ no extraordinary lords. And also, that the lords
 ‘ of the justice-court shall be distinct from those of
 ‘ the session, and under the same restrictions.

12. ‘ That if any King break in upon any of
 ‘ these conditions of government, he shall, by the
 ‘ estates, be declared to have forfeited the crown.

‘ Which proclamation made, they are to go on
 ‘ to the naming and declaring a successor: and
 ‘ when he is declared, if present, are to read to
 ‘ him the claim of right and conditions of govern-
 ‘ ment above-mentioned, and to desire of him, that
 ‘ he may accept the crown accordingly; and he ac-
 ‘ cepting, they are to administer to him the oath of
 ‘ coronation: but, if the successor be not present,
 ‘ they are to delegate such of their own number as
 ‘ they shall think fit, to see the same performed, as
 ‘ said is: and are to continue in the administra-
 ‘ tion of the government, until the successor’s ac-
 ‘ cepting of the crown, upon the aforesaid terms,

‘ be known to them : whereupon having then a king
 ‘ at their head, they shall, by his authority, declare
 ‘ themselves a parliament, and proceed to the doing
 ‘ of whatever shall be thought expedient for the
 ‘ welfare of the realm. And it is likewise, by the
 ‘ authority aforesaid, declared, that if her present
 ‘ majesty shall think fit, during her own time, with
 ‘ the advice and consent of the estates of parliament,
 ‘ failing heirs of her body, to declare a successor,
 ‘ yet nevertheless, after her majesty’s decease, the
 ‘ members of parliament or convention shall, in the
 ‘ several cases, and after the manner above specified,
 ‘ meet and admit the successor to the government,
 ‘ in the terms, and after the manner, as said is.
 ‘ And it is hereby further declared, that after the
 ‘ decease of her majesty, and failing heirs of her
 ‘ body, the fore-mentioned manner and method
 ‘ shall, in the several cases, be that of declaring and
 ‘ admitting to the government all those who shall
 ‘ hereafter succeed to the imperial crown of this
 ‘ realm : and that it shall be high treason for any
 ‘ man to own or acknowledge any person as King
 ‘ or Queen of this realm, till they are declared and
 ‘ admitted in the above-mentioned manner. And
 ‘ lastly, it is hereby declared, that by the death of
 ‘ her majesty, or any of her successors, all commis-
 ‘ sions, both civil and military, fall and are void ;
 ‘ and that this act shall come in place of the seven-
 ‘ teenth act of the sixth session of King William’s
 ‘ parliament. And all acts and laws, that any way
 ‘ derogate from this present act, are hereby in so
 ‘ far declared void and abrogated.’

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Fletcher, Andrew

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Aberdeen 1823

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